

No. _____

In the Supreme Court of Texas

NORBETO “BETO” SALINAS,
Petitioner

v.

ARMANDO O’CAÑA,
Respondent

ON PETITION FOR REVIEW FROM THE
THIRTEENTH COURT OF APPEALS AT CORPUS CHRISTI, TEXAS
No. 13-18-00563-CV

PETITION FOR REVIEW

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TO THE HONORABLE SUPREME COURT OF TEXAS:

STATEMENT OF THE CASE

Nature of the Case: This is an election contest concerning the recent Mission, Texas mayoral race. CR24-27. While the record contains undisputed evidence demonstrating orchestrated voter fraud, the party benefitting from that fraud is currently serving as Mission's mayor. *See, e.g.,* 3RR28,47,58;4RR91-97;5RR15,20,23-24,32-33,51-53;9RR288-92;10RR31,47,49,51,54,62,68-71,75-78,81-88,90-96,98-99,102,128-29;PX8,20.

Trial Court: Cause No. C-2637-18-B; 93rd Judicial District Court of Hidalgo County, Texas; Hon. J. Bonner Dorsey, presiding.

Trial-Court's Disposition: After a nine-day bench trial, the trial court determined it could not ascertain the election's true outcome and declared the election void under Texas Election Code subsection 221.012(b).¹ SuppCR78-79 (App'x B). The trial court later amended its judgment, adding that a new mayoral election must occur within sixty days. SuppCR80-81 (App'x C).

Court of Appeals: Thirteenth Court of Appeals at Edinburg, opinion by Chief Justice Contreras, joined by Justice Benavides, with Justice Hinojosa dissenting. The case citation is *O'Caña v. Salinas*, No. 13-18-00563-CV, 2019 WL 1414021 (Tex. App.—Corpus Christi Mar. 29, 2019) (App'x D), *opinion corrected by*, No. 13-18-00563-CV, 2019 WL 1442977 (Tex. App.—Corpus Christi Apr. 2, 2019) (App'x E).

Court-of-Appeals's Disposition: The majority held the evidence was legally insufficient to support the trial-court's finding that

¹ “The tribunal shall declare the election void if it cannot ascertain the true outcome of the election.” TEX. ELEC. CODE § 221.012(b) (App'x A).

the illegal votes exceeded the sitting mayor’s victory margin. *Id.* at *12. Consequently, it reversed the judgment voiding the election and rendered judgment denying the election contest. *Id.*

STATEMENT OF JURISDICTION

This Court has jurisdiction over this case under Subsection 22.001(a) of the Texas Government Code, because—as is described below in the “Reasons to Grant Review” section—this case presents a question of law that is important to the jurisprudence of the State.

ISSUES PRESENTED

1. Did the court of appeals err by reversing and rendering the trial court's judgment that an election's true outcome could not be ascertained when 158 votes represented the margin of victory, and evidence of the winner's orchestrated voter fraud established there were between 307 and 709 illegal votes? In rejecting this evidence, did the court of appeals misapply the standard of review by:

- i. failing to consider all the evidence when performing a clear-and-convincing legal sufficiency review;
- ii. usurping the trial court's role concerning witnesses' testimony;
- iii. applying the clear-and-convincing standard to evidence in isolation; and
- iv. crediting inferences unfavorable to the judgement?

2. Did the court of appeals also err when it conflated a witness's informed estimation with a pure guess?

UNBRIEFED ISSUES

3. Under Texas Rule of Appellate Procedure 47.1, appellate courts must address every issue raised and necessary to an appeal's final disposition. When an appellant's failure to preserve error prevents the reviewing court from reaching the issues on appeal, the reviewing court errs by failing to address the appellee's preservation arguments. Did the court of appeals err by reversing the judgment without addressing Salinas's arguments that O'Caña failed to preserve:

- i. challenges to the expert witness's qualifications and his opinions pertaining to vote bribery;
- ii. challenges to the expert's testimony on mail-in votes; and
- iv. challenges to the spoliation inference adopted by the trial court?

4. If the Court grants review, should it consider and decide the preservation/waiver issues to promote judicial economy?

5. Did the court of appeals err by holding the trial court abused its discretion by making a spoliation inference when it premised this holding on:

i. the absence of trial court findings supporting the inference when this Court has stated in *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 n.9 (Tex. 1991), that trial courts do not have not make these findings;

ii. the alleged absence of evidence supporting duty when, among other things, the record contained undisputed evidence that O’Caña admitted to deleting materials before, during, and after Salinas filed suit, admitted to knowing that people were asking his constituents for affidavits relating to the election before filing suit, and the deleted material contained conversations between him and those who assisted in the voter fraud; and

iii. unraised and unpreserved arguments when appellate courts cannot base part of their judgments on unpreserved issues?

REASONS TO GRANT REVIEW

This case’s fact pattern could easily serve as a law-school exam on election contests. It involves evidence of orchestrated voter fraud—including bribed votes and illegal ballot harvesting—that exceeds the margin of victory in Mission, Texas’ runoff mayoral election. It also involves the destruction of evidence and subpoena dodging.

Unfortunately, this is not a law school exam. The will of Mission’s voters has been usurped, and their voice is not truly being heard. The trial court, who was in the best position to evaluate the evidence and the witnesses’ credibility, found clear-and-convincing-evidence that illegal votes exceeded the margin of victory. It also

declared the election void and ordered a new election. But through a tortured application of the standard of review, the court of appeals reversed.

While the true number of illegal votes cast in the sitting mayor's favor are unknown, the effects of the fraud are certain, as are the far-reaching effects of the court-of-appeals's errors. The sitting mayor whose campaign bribed voters and harvested ballots continues to serve, which undermines the public's trust in elections and the judiciary. The court-of-appeals' errors also have an extended reach because they involve non-compliance with established rules of procedure, standards of review, and precedent. The panel split concerning the deference to trial courts and judgments mandated by this Court's standards of review, which reinforces the error. The opinion also conflicts with this Court's and other intermediate appellate courts' application of those standards.

While the opinion does not directly involve constitutional issues, it does negatively affect the democratic process and citizens' rights to elect their chosen leaders. The court's legal errors are of such importance to the state's jurisprudence that they should be corrected. Mission's residents and other Texas citizens must maintain faith in the judiciary. When sufficient evidence of voter fraud exists that would affect an election's outcome, it falls on the courts to properly apply the law and provide the electorate with the relief they deserve.

STATEMENT OF FACTS

The General Election: Mission, Texas’s then-incumbent mayor, Norberto “Beto” Salinas, outpolled Armando O’Caña in May 2018’s general election. *See* 9RR151,219-22;PX90,95. In a three-man race consisting of 6,175 total votes, Salinas garnered 3,085 votes to O’Caña’s 2,571. *Id.* Salinas fell three votes short of winning and avoiding a runoff. 5RR10;9RR151,219-22;PX90,95.

The Anomalous Runoff: Despite losing by 514 votes in the general election, a month later, O’Caña defeated Salinas by 157 votes in the June 2018 runoff. 9RR151;PX91,95. The runoff produced some rarely or never seen occurrences: voter turnout increased by 618 and mail-in ballots increased to historic levels despite a shortened timeframe. 9RR225,230-31,244,247;10RR28;PX91-92,94-95. This occurred notwithstanding the absence of factors that typically increase voter participation, like an accompanying bond issue or referendum. 5RR20-21;9RR249-52. It also occurred even though O’Caña did not possess more campaign funds. *See* 9RR51,71,260;DX9-10,34-37. While anomalous, Hidalgo County had seen this before—in a runoff that resulted in multiple arrests for voter fraud. *See* 9RR236-39.

From Anomaly to Reality (Voter Fraud): The runoff’s unusual voter turnout heavily favored O’Caña. *See* 9RR253-60;PX95. While O’Caña attributed it to his message of hope and legitimate campaign strategy, the reality is orchestrated

voter fraud again produced this anomalous result.² The campaign conspired to, and did, collect illegal votes through bribery and harvesting mail-in ballots.³

Bribery: The campaign would pick up voters in a white Mercedes van rented to facilitate the bribery.⁴ Because merely paying and transporting voters to the polls would not guarantee votes for O’Caña, his campaign coached the voters to request assistance with their votes, so the campaign could be present to ensure its bribe money was well spent. 4RR56,91-94,96-97,105,108,113-14;5RR70-71;9RR7-10,15-17,38,102;PX20. The votes occurred inside the van at the polling places, and the campaign paid the voters after assisting their votes. *See, e.g.*, 3RR53;PX8. The campaign also rounded up voters and encouraged them to recruit others. *See, e.g.*, 3RR57,133-34,142;PX8,12.

Ballot Harvesting: Through its agents, Elizabeth “Liz” Hernandez and Esmerelda Lara, the O’Caña campaign also successfully harvested 200 mail-in ballots. They targeted elderly and disabled voters to obtain their mail-in ballots in an

² *See, e.g.*, 3RR28,47,58;4RR91-97;5RR15,20,23-24,32-33,51-53;9RR7-20,288-92;10RR31,47,49,51-54,62,68-71,75-78,81-88,90-96,98-99,102,128-29;PX8,20.

³ Due to word-count restraints, this contains a brief recitation of the voter fraud and the conspiracy. Salinas’s appellate brief contains more detailed descriptions and record citations. APPELLANT’S BRIEF at 9-29.

⁴ 2RR146-47;3RR33-37,41-60;5RR70-71,78-79;6RR91,93-94,96-97,99,101-05,233-37,239;9RR304-05;PX8.

orchestrated effort to spoil Salinas's votes and increase O'Caña's votes.⁵ They took the mail-in ballots and deposited them in the mail without signing the form on the carrier envelope's back side to indicate assistance was rendered. *See, e.g.*, 3RR244-61;PX33; TEX. ELEC. CODE §§ 86.005 (App'x F), .0051 (App'x G), .006(a)-(h) (App'x H), .010 (App'x I) (demonstrating the votes were illegal and could not be counted).

Several witnesses testified that Hernandez and Lara harvested their ballots.⁶ And, each carrier envelope for these witnesses' ballots contained the following unique stamp: a 2018 Forever Stamp with a folded American flag and perforated side edges.⁷ The stamps' perforated edges indicate that they came from a \$50 roll instead of other less costly alternatives, such as individually-purchased stamps or booklets.⁸ 9RR274-76.

The 200 Ballots: Carmen Ochoa saw Lara at an assisted-living facility for the elderly. 3RR178-81,194,200;PX26. Ochoa observed Lara carrying a stack of ballots approximately five-inches thick, and estimated the stack contained 200

⁵ 2RR121-22,126,158-63,171-74;3RR209-18,224-25,241-61,265-67;5RR87-92,97-98,103-06,108;6RR24-30;7RR10-11,13-16,18-22,26-27,29-32,36,43-44,87,91-100,103-06,114,130-36,142,171-75,178-98;8RR64-68,70-75,85,88;10RR185-97;PX3-4A,27,29-33,42-45,50-51,61,64,66,68-71,75-76,96,100.

⁶ *Id.*

⁷ *See, e.g.*, 5RR98;7RR103,186;8RR75;PX29-33,43,45,50,61,64,66,70,76.

⁸ O'Caña admitted to buying rolls of stamps for his campaign. 5RR30-31.

ballots because each ballot is as thick as a single piece of paper. 3RR181-84,201,205-06. Maribel Salinas also saw Lara at a senior-housing community, carrying ballots in a large shoulder bag. 10RR143-45,156-57.

Expert Testimony: George Korbel provided testimony based on his extensive experience with election analysis. 9RR113-20,122-49,159-63,165-87,206,295-96;10RR63. He attested to having experience with both in-person and mail-in voter fraud, including ballot harvesting. 9RR120,122-23,125-26,132-39,142-43,296;10RR42-43.

Korbel estimated that at least 48 voters were bribed. 10RR98. He formed his opinion by reviewing testimony and the election materials, and analyzing how many voters were assisted by O'Caña campaign workers on days in which there was evidence that the O'Caña campaign bribed voters. *See* 9RR304,313;10RR75-78,81-96,98;PX20. After reviewing the combination forms, Korbel discovered that throughout the runoff's early voting period and on election day, O'Caña campaign workers assisted 174 voters. 9RR304,308;PX20.

Korbel also testified that the illegally-harvested ballots ranged between 27-303. 9RR310-11,318;10RR31,47,62,64. He determined the range's lower end by reviewing affidavits and election materials, interviewing voters, and listening to live

testimony.⁹ After combing through the evidence, Korbel determined that there were 303 envelopes that matched those directly proven to be harvested by the O’Caña campaign and that similarly bore stamps from expensive rolls. 9RR311,316–18;10RR59–60.

The Cover-Up: O’Caña gave most of his campaign funds to a newly-created political-operative firm owned by his niece, Veronica, but he did not retain any associated records. 4RR56,105-07,113,115-16;5RR59,82;9RR10-14;PX38. O’Caña also communicated with Hernandez, Lara, Jesus “Jesse” Rodriguez, Laura Rodriguez, and Guadalupe “Lupita” O’Caña—individuals who helped facilitate the voter fraud. 4RR91-97;9RR7-19.

While communicating primarily with text messages, O’Caña admitted to either deleting or losing these messages before, during, and after this lawsuit was filed. 9RR10-19. Further, although Salinas made many attempts to subpoena O’Caña’s niece and other key witnesses to attend trial, neither those attempts, nor an agreement with opposing counsel, nor a bench warrant were effective, as they repeatedly dodged service. 1RR19-20;4RR96;5RR47-51,71-72;6RR17-19;8RR5-8,11;10RR135-40;CR9-10.

⁹

9RR263-64,265-67,271-72,281-82,298,317-18;10RR31-49.

The Trial Court’s Findings, Conclusions, and Its Amended Judgment:

The trial court found that the O’Caña campaign illegally bribed voters, harvested ballots, and assisted voters in voting in excess of 158 votes.¹⁰ 2SuppCR36 (App’x J). The trial court then concluded that the precise number votes cast for O’Caña in the runoff could not be ascertained. *Id.* It also concluded that a spoliation inference was justified based on the O’Caña campaign’s efforts to destroy evidence. *Id.* In an amended judgment, the trial court declared the election void and ordered a new mayoral election within sixty days. SuppCR80-81.

SUMMARY OF THE ARGUMENT

After hearing numerous witnesses testify they were bribed or their ballots harvested, and expert testimony regarding these types of illegal votes, the trial court properly concluded at least 158-illegal votes were procured. When reviewed properly, the record demonstrates O’Caña’s campaign bribed voters and harvested ballots, which led to 307-to-709 illegal votes.

The court of appeals, however, misapplied standards of review when it failed to credit favorable evidence that the campaign harvested 200 ballots and bribed at least 48 voters. It also conflated the rules on speculative evidence with informed

¹⁰ While the victory margin was 157, a harvested voter testified that she and her husband (who also had his vote harvested) eventually voted in person, thus cancelling their votes. 2RR94,96-100,110,114-15. She further admitted to voting for Salinas, which increased his margin of defeat to 158 votes. 2RR100.

estimations based on observations by lay witnesses. The court again incorrectly applied the review standards when (1) it segregated evidence and required the isolated evidence to be clear-and-convincing; and (2) held the election expert's testimony was conclusory.

This Court should reverse the court-of-appeals's judgment and reinstate the trial-court's order requiring a new election, so that the will of the voters can be effectuated.

ARGUMENT

I. The Thirteenth Court did not correctly apply the standard of review and made other legal errors when considering the evidence.

The Thirteenth Court misapplied the standard of review and made other legal errors when considering the evidence. When reviewing legal sufficiency pursuant to the clear-and-convincing-proof standard, appellate courts must “look at *all the evidence in the light most favorable to the finding* to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.” *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002) (emphasis added). Appellate courts must also assume trial courts resolve disputed facts in favor of their findings if reasonable trial courts could do so. *Id.*

The Thirteenth Court did not, however, correctly apply this Court's standard to the finding that illegal votes exceeded 158. It also made some additional legal errors when evaluating the evidence.

A. The Thirteenth Court erred in its legal sufficiency review.

1. Summary of the Evidence

When the standard is properly applied, the record demonstrates that legally sufficient evidence supports the trial-court's finding. The following table broadly summarizes the evidence, discussed more fully below:

<u>Illegal-Vote Category</u>	<u>Source</u>	<u>Illegal-Vote Number</u>
Vote-Bribery	Multiple Sources	14¹¹
Ballot-Harvesting	Multiple Sources	18
Ballot-Harvesting	Ochoa's and Maribel Salinas's Testimony	200
Vote-Bribery	Expert Testimony	48-174
Ballot-Harvesting	Expert Testimony	27-303
General Conspiracy	Multiple Sources	Bolsters Expert Testimony
	TOTAL ILLEGAL VOTES =	307-709

¹¹ The Thirteenth Court held that direct testimony established the O'Caña campaign bribed thirteen voters. *O'Caña*, 2019 WL 1414021, at *9. The record demonstrates that fourteen voters were identified through testimony. 3RR44-46,53,86-88,148-49,152,159,168-69;6RR39,48,93,239,251,254.

While the numbers are presented as a range, both the low and high ends demonstrate that there were far more than the 158-illegal votes necessary to support the finding. Direct evidence supports the first three categories. Evidence and the expert's opinion testimony support the next two. Direct evidence also supports the last category, bolstering the other categories and providing circumstantial support for the top end of the expert's range. Lastly, a spoliation inference further bolsters this existing record evidence and provides more support for crediting the range's top end.

Because the record provides ample support for the trial-court's finding, to reverse the judgment, the Thirteenth Court had to at least hold that Ochoa's 200-vote testimony was no evidence. It also had to discount the expert's testimony to the bottom end of the possible ranges (or find it altogether unreliable). Further, the court had to discount circumstantial evidence and hold the trial court abused its discretion with the spoliation inference.

2. Ochoa's Testimony

The Thirteenth Court misapplied the review standards when analyzing the evidence. Perhaps the most impactful,¹² the court erroneously characterized Ochoa's testimony regarding Lara's illegal possession of 200 ballots as a mere guess. *O'Caña*, 2019 WL 1414021, at *11. Ochoa testified she saw Lara with a "bunch of

¹² The evidence and the law demonstrate that Ochoa's testimony alone would support the trial court's finding. See APPELLEE'S BR. at 47-48.

ballots in her hand,” which she estimated to be approximately five-inches thick. 3RR181,205-06. Ochoa further observed that each ballot was as thick as a single piece of paper. 3RR181-83. She testified that she figured the ballots numbered “around 200, more or less.” 3RR184. Ochoa then stated she saw 200 ballots in Lara’s possession. 3RR184,202.

In a pretrial affidavit, however, Ochoa had estimated the ballots to number 20-40. 3RR201-02. At trial, counsel inquired about the discrepancy between the numbers, to which Ochoa stated, “I only kind of guess” and reiterated that Lara possessed 200 ballots. 3RR201-02 (App’x K). Viewing this testimony in this context pursuant to the review standard, the dissent believed the “guess” referred to Ochoa’s earlier affidavit testimony. *O’Caña*, 2019 WL 1414021, at *24-25.

i. Misapplying the Judgment-Deference Standard

The Thirteenth Court misapplied the judgment-deference standard when evaluating Ochoa’s testimony. Tasked with viewing all evidence, the court erroneously viewed Ochoa’s “guess” statement solely in conjunction with the 200-ballots testimony, in a manner that is unfavorable to the finding. *O’Caña*, 2019 WL 1414021, at *11. It did not consider the statement in the context in which it occurred: when talking about the discrepancy between Ochoa’s affidavit and her trial

testimony.¹³ *Id.*; 3RR201-02. The court also did not afford Maribel Salinas's testimony—she testified to seeing Lara carrying ballots in a large shoulder bag—and circumstantial evidence proper weight in light of Ochoa's testimony. 10RR143,156-57. Consequently, the court did not look at all the evidence and did not do so in the light most favorable to the finding. *Id.*

ii. Usurping the Trial-Court's Role

The Thirteenth Court further misapplied the review standards by usurping the trial-court's role. The clear-and-convincing evidentiary review exclusively tasks triers-of-fact with observing witnesses to determine credibility and their testimony's weight. *See In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009). Where fact-finders are faced with reasonable credibility determinations, witnesses' contradictory statements must be ignored, and appellate courts must defer to the credibility determinations. *Bentley v. Bunton*, 94 S.W.3d 561, 599 (Tex. 2002).

The Thirteenth Court should have ignored Ochoa's "guess" statement and deferred to the trial court's determination. Ochoa testified that she saw Lara with 200 ballots by first stating she figured it was around 200, and then affirmatively stating that she saw 200. 3RR184. If Ochoa's later "guess" statement actually related to her trial testimony (as the Thirteenth Court believed it did) and was taken out of

¹³ The Thirteenth Court cited this Court's precedent to reach its holding. *O'Caña*, 2019 WL 1414021, at *11 (citing *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 229 (Tex. 2011)). This Court, however, considered testimony in context when determining its legal sufficiency. *Guerra*, 348 S.W.3d at 229.

context to mean Ochoa had speculated as to the number (as the Thirteenth Court assumed), then it would contradict her earlier testimony. *Compare* 3RR184,202, with *O’Caña*, 2019 WL 1414021, at *11 & n.14. Instead of ignoring the contradictory testimony, the court impermissibly credited it.

Assuming the statements were not contradictory and there were room for reasonable disagreement, the Thirteenth Court should have still deferred to the trial court’s determination because it was best positioned to interpret Ochoa’s testimony. *See, e.g., Bendelin v. Thompson*, 33 S.W.2d 220, 222 (Tex. Civ. App.—El Paso 1930, writ dism’d w.o.j.) (presuming ambiguous testimony supported finding because trial court best positioned to adjudge it).

iii. Conflating Informed Estimations with Pure Guesses

Regardless, if the Thirteenth Court correctly linked the “guess” statement to the 200 ballots, it erroneously failed to recognize that witnesses are entitled to make informed estimations, and simply using the word “guess” does not make testimony speculative. *See, e.g., Gibson v. Avery*, 463 S.W.2d 277, 281 (Tex. Civ. App.—Fort Worth 1970, writ ref’d n.r.e.) (holding testimony admissible even though witness used the words ‘I guess’ because it was an estimate or opinion); *Gonzalez v. Layton*, 429 S.W.2d 215, 222 (Tex. Civ. App.—Corpus Christi 1968, no writ) (Sharpe, J., concurring) (“The term ‘guess’ is not regarded as being a mere conjecture or speculation but as a colloquial way of expressing an estimate or opinion.”). If the

Thirteenth Court properly linked the “guess” statement to the 200 ballots, Ochoa’s testimony demonstrates that her “guess” was an estimate based upon (1) a ballot’s thickness in relation to a piece of paper; and (2) the thickness of the amount in Lara’s hand. 3RR181-84,201-02,205-06.

3. Other Instances of Disregarding Relevant Evidence and Crediting Unfavorable Inferences

The Thirteenth Court did not consider all the evidence favorable to the finding and erroneously credited negative inferences. Most notably, the court did not mention Korbel’s expert testimony that the campaign workers involved in the vote bribery assisted 174 voters in the runoff election.¹⁴ 9RR304,308;PX20. It also barely mentioned overwhelming evidence illustrating the successful conspiracy to commit the voter fraud, including preying on the elderly/infirm and attempting to cover it up.¹⁵ Coupled with evidence that the same campaign workers coached voters to ask for assistance, had them vote for O’Caña, and paid them, the trial court could have reasonably inferred that the campaign did so when assisting the 174 voters.

¹⁴ While Korbel opined that 48 voters were bribed, the fact that the same campaign workers had assisted 174 voters is circumstantial evidence that the campaign bribed more.

¹⁵ 1RR19-20;2RR121-22,126,145-52,154-56,158-63,171-74;3RR19,22-23,28,32-60,63-64,80-81,148-49,151-54,159-60,169-70,174,209-18,224-25,241-61,265-67;4RR56,91-97,105-07,113,115-16;5RR15,20,23-24,32-33,47-53,59,70-72,78-79,82,87-92,97-98,103-06,108;6RR17-19,24-30,33,35,38-49,72-73,79-80,82,91-94,96-97,99,100-10,232-37,239,251-59;7RR10-11,13-16,18-22,26-27,29-32,36,38,43-44,87,91-100,103-06,114,130-36,142,171-75,178-98;8RR5-8,11,44-47,52,64-68,70-75,85,88;9RR7-19,288-92;10RR31,47,49,51-54,62,68-71,75-78,81-88,90-96,98-99,102,128-29,135-40,173,177-78,185-97;PX1,3-4A,5-6,8,13-14,20,23,27,29-33,42-45,50-51,61,64,66,68-71,75-76,96,100;CR9-10.

2Supp30-32. The trial court could have also credited the conspiracy evidence when evaluating Korbel's remaining conclusions regarding the number of bribed voters/harvested ballots and use the evidence to form a firm belief that its finding was true. 2Supp30-37.

The Thirteenth Court similarly erred when it discounted some conspiracy evidence because “a plurality of the [18] illegally harvested ballots proven at trial were actually cast for Salinas....” *O’Caña*, 2019 WL 1414021, at *10 n.12. This statement adopts an unfavorable inference and relies on an incomplete grasp of the record and the law. The court based this statement on the purported fact that six of the voters testified they cast their mail-in ballots for Salinas *before* giving them to O’Caña campaign workers. *Id.*

The witnesses who allegedly voted for Salinas, however, gave their ballots to O’Caña’s campaign workers.¹⁶ They also testified that their ballots were largely unsealed when they handed them over, and at least one could not remember whether he voted for Salinas in the general or runoff.¹⁷

While the witnesses testified they cast their votes for Salinas before giving the ballots to O’Caña’s harvesters, there is no way to be certain the votes were not

¹⁶ 2RR94,96-99,100,110,114-15;3RR212-13;7RR130-35,180-81,193,202;8RR71-72,75,107,110.

¹⁷ *Id.*

changed, which is precisely why these types of votes are not counted under the Election Code. *See* TEX. ELEC. CODE §§ 86.005, .0051, .006(a)-(h), .010.

The campaign was already committing voter fraud to help O’Caña get elected.¹⁸ It is reasonable to favorably infer that the campaign would alter the ballots before mailing them. *See id.* Instead, Thirteenth Court credited the opposite, insupportable inference—that O’Caña’s campaign illegally harvested votes to benefit Salinas. *O’Caña*, 2019 WL 1414021, at *10 n.12.

4. Incorrectly Applying Clear-and-Convincing Standard to Segregated Evidence

The Thirteenth Court misapplied the review standard by viewing categories of evidence in isolation and requiring the segregated evidence to independently meet the clear-and-convincing standard. As the dissent noted, the proper review standard does not require “that every opinion, assumption, or inference meet a [clear-and-convincing] standard.” *O’Caña*, 2019 WL 1414021, at 23. The same rings true concerning every piece of, or category of, evidence. *See J.F.C.*, 96 S.W.3d at 266.

Instead of considering all the evidence favorable to the finding, the Thirteenth Court considered evidence separately and required that it meet the clear-and-convincing standard. *O’Caña*, 2019 WL 1414021, at *9-11 (stating “there was at

¹⁸ See, e.g., 3RR28,47,58;4RR91-97;5RR15,20,23-24,32-33,51-53;9RR7-20,288-92;10RR31,47,49,51-54,62,68-71,75-78,81-88,90-96,98-99,102,128-29;PX8,20.

most 31 votes for which there was clear-and-convincing evidence of illegality . . . [t]his case therefore hinges on the circumstantial evidence of illegal votes” and then examining whether the purported circumstantial evidence and inferences alone were clear-and-convincing); *id.* at *10 (applying the clear-and-convincing standard to Korbel’s vote-harvesting testimony in isolation); *id.* at *11 (“[W]e cannot say that Ochoa’s ‘guess,’ even combined with Maribel Salinas’s testimony and other circumstantial evidence, constitutes [clear-and-convincing] evidence....).

B. The Thirteenth Court erred when evaluating the election-expert’s testimony regarding bribery.

To discount Korbel’s testimony, the Thirteenth Court omitted key facts and incorrectly evaluated Korbel’s conclusions. The court held Korbel’s testimony concerning 48 additionally bribed voters was not probative. *Id.* at *9. It did so because it found an analytical gap in Korbel’s testimony, premised on Korbel having “nothing in his background that would indicate an expertise in vote bribery,” and because Korbel “assume[ed] that ‘if you pay one [voter],. . . you’re going to pay everybody[,] and that’s the way the world works.’” *Id.*

The record demonstrates there was no analytical gap, and again demonstrates the review-standard’s misapplication. Korbel has an extensive background that qualifies him to look at votes, determine their illegality, and identify illegal voting activity. 9RR113-20,122-49,159-63,165-87,206,295-96;10RR42-43,63;CR107-15. He formed his opinion by reviewing election materials, conducting interviews, and

analyzing how many voters the O’Caña campaign workers assisted on days in which there was also evidence that the O’Caña campaign was offering bribes to voters. 9RR114-16,149-57,208-11,294,298,304,313;10RR74-78,81-96,98-99;PX20.

Korbel also used statistical analysis, 9RR150-57,208,294, which is an accepted methodology to determine election-based facts. *See, e.g., Green v. Reyes*, 836 S.W.2d 203, 205 (Tex. App.—Houston [14th Dist.] 1992, no pet.). And, Korbel employed methods that he has used to analyze racially polarized voting in other elections. 9RR114-16,149-57,209-11. The Thirteenth Court, however, did not discuss or credit any of these facts. *O’Caña*, 2019 WL 1414021, at *9. Regardless, these facts demonstrate that Korbel’s opinion was premised on his experience and the data.

Korbel’s opinion was also supported by evidence¹⁹ and the following reasonable inference that the Thirteenth Court should have credited: due to the uncertain number of votes necessary to win, individuals paying voters during a certain time period were trying to acquire as many votes as possible. This inference is also supported by the evidence that campaign workers rounded people up and encouraged them to recruit more voters. *See, e.g.,* 3RR57,133-34,142;PX8,12. The

¹⁹ See, e.g., 2RR146-47;3RR33-37,41-60;4RR56,91-94,96-97,105,108,113-14; 5RR70-71,78-79;6RR91,93-94,96-97,99,101-05,233-37,239;9RR7-10,15-17,38,102,304-05;PX8.

unfavorable inference from the same evidence would be the one that the court implicitly recognized: the same individuals only bribed the limited number of voters—those identified in testimony—that they assisted during the same time period. Nonetheless, the court could not credit any competing inference over a reasonable one that is supported by evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 821 (Tex. 2005).

Lastly, as the dissent noted, this Court has found it appropriate in these types of cases to analyze whether the expert's opinion fits the case's facts. *O'Caña*, 2019 WL 1414021, at *22-23. The Thirteenth Court did not do so. *Id.* at *9. And, even if it had, Korbel's opinion fits the facts here.

C. The Thirteenth Court erred when evaluating the election-expert's testimony regarding harvested ballots.

The Thirteenth Court again omitted certain relevant facts and made errors when evaluating Korbel's testimony concerning 303 potentially harvested votes. The court provided three reasons for disregarding Korbel's testimony, none of which can be supported absent a complete disregard for favorable record evidence (with no explanation for why the evidence is being disregarded).

First, the Thirteenth Court held Korbel did not supply any reason to assume that the Mission mail-in voters—with a stamp originating from a \$50 roll—could not afford those stamps. *Id.* at *9-10. But in fact, the record undisputedly shows O'Caña's campaign harvested votes in poorer areas and from elderly residents who

typically live on fixed incomes.²⁰ Additionally, Korbel relied on evidence that (1) O’Caña’s campaign purchased rolls of stamps; (2) the campaign had harvested ballots that contained those type of stamps; and (3) a campaign worker was seen carrying 200 mail-in ballots.²¹ The court omitted any reference to these facts and did not properly credit them in its review.

Second, the Thirteenth Court criticized Korbel for assuming that all the harvested votes were cast for O’Caña. *Id.* But the evidence overwhelmingly shows that the O’Caña campaign was the only campaign harvesting votes.²² Again, it is reasonable and supported by the record that they were doing so to ensure the votes were cast for O’Caña. Korbel’s assumption, therefore, had support and should have been credited.

Finally, the Thirteenth Court found Korbel’s testimony did not justify a reasonable inference that the votes were illegal. *Id.* The court assumed that Korbel’s testimony had to solely justify the inference that the votes were illegal. *Id.* By doing so, it again omitted and did not credit the other evidence of orchestrated ballot

²⁰ 3RR179-80,194,200,214-15;9RR282-85;10RR143-45,147;PX26.

²¹ See, e.g., 2RR121-22,126,158-63,171-74;3RR181-84,201,205-06;5RR30-31;PX3, 4A,100.

²² 2RR121-22,126,158-63,171-74;3RR209-18,224-25,241-61,265-67;5RR87-92,97-98,103-06,108;6RR24-30;7RR10-11,13-16,18-22,26-27,29-32,36,43-44,87,91-100,103-06,114,130-36,142,171-75,178-98;8RR64-68,70-75,85,88;10RR185-97;PX3-4A,27,29-33,42-45,50-51,61,64,66,68-71,75-76,96,100.

harvesting discussed above. *See id.*

The Thirteenth Court also credited unfavorable inferences lacking evidentiary support to discount Korbel's assumptions. For example, to discount the possibility that rampant voter fraud occurred, it inferred that some mail-in voters went to the post office and received the same stamp or gave their votes to another who purchased the stamp. *O'Caña*, 2019 WL 1414021, at *10. But there is no evidence in the record to support these inferences. Conversely, as discussed above, there is substantial evidence in the record concerning the O'Caña campaign's orchestrated voter fraud.²³

PRAYER

For the foregoing reasons, Salinas respectfully asks that the Court grant his petition for review, reverse the Thirteenth Court's judgment, affirm the trial court's judgment voiding the election, but reverse its judgment solely as to the deadline for a new election and remand the case so that the trial court may establish a new deadline. Salinas also requests any other relief to which he is entitled.

²³ See, e.g., 3RR28,47,58;4RR91-97;5RR15,20,23-24,32-33,51-53;9RR7-20,288-92;10RR31,47,49,51-54,62,68-71,75-78,81-88,90-96,98-99,102,128-29;PX8,20.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Texas Rule of Appellate Procedure 9.4(i) because it contains no more than 4,244 words, excluding any parts exempted by Rule 9.4(i)(1).

/s/ Maitreya Tomlinson

Maitreya Tomlinson

CERTIFICATE OF SERVICE

On May 6, 2019, in compliance with Texas Rule of Appellate Procedure 9.5, I served a copy of this notice upon all other parties proceeding by e-mail and/or facsimile as follows:

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/s/ Maitreya Tomlinson
Maitreya Tomlinson

No. _____

In the Supreme Court of Texas

NORBETO “BETO” SALINAS,
Petitioner

v.

ARMANDO O’CAÑA,
Respondent

ON PETITION FOR REVIEW FROM THE
THIRTEENTH COURT OF APPEALS AT EDINBURG, TEXAS
No. 13-18-00563-CV

APPENDIX TO PETITION FOR REVIEW

Texas Election Code § 221.012	Tab A
Final Judgment (October 26, 2018)	Tab B
Amended Final Judgment (November 6, 2018).....	Tab C
Court-of-Appeals’s Memorandum Opinion and Judgment	Tab D
Notice of Correction to Memorandum Opinion	Tab E
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Texas Election Code § 86.0051	Tab G
Texas Election Code § 86.006	Tab H
Texas Election Code § 86.010	Tab I
Findings of Fact and Conclusions of Law (November 9, 2018)	Tab J

Reporter's Record (Excerpt - Carmen Ochoa's Testimony) Tab K

Tab A

Vernon's Texas Statutes and Codes Annotated

Election Code (Refs & Annos)

Title 14. Election Contests

Subtitle A. Introductory Provisions

Chapter 221. General Provisions (Refs & Annos)

V.T.C.A., Election Code § 221.012

§ 221.012. Tribunal's Action on Contest

Currentness

(a) If the tribunal hearing an election contest can ascertain the true outcome of the election, the tribunal shall declare the outcome.

(b) The tribunal shall declare the election void if it cannot ascertain the true outcome of the election.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

Notes of Decisions (46)

V. T. C. A., Election Code § 221.012, TX ELECTION § 221.012

Current through Chapters effective immediately through Chapter 5 of the 2019 Regular Session of the 86th Legislature

End of Document

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TAB A

Tab B

NO. C-2637-18-B

NORBERTO "BETO" SALINAS
Contestant

§
§
§
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§

IN THE DISTRICT COURT

V.
ARMANDO O'CANA
Contestee

93RD JUDICIAL DISTRICT
HIDALGO COUNTY, TEXAS

FINAL JUDGMENT

From September 24, 2018 through October 5, 2018, the Court, pursuant to the Texas Election Code, conducted a trial to ascertain whether the outcome of the contested election in the above-styled and numbered cause, concerning the June 9, 2018, City of Mission, Texas mayoral run-off election between Norberto "Beto" Salinas and Armando O'Caña, as shown in the final canvass was not the true outcome of the contested election.

On said dates, the case was called for trial before the court. Contestant Salinas, appeared in person and by and through his attorneys of record and announced ready for trial. Contestee Armando O'Caña, appeared in person and by and through his attorneys of record and announced ready for trial.

All matters and controversy, legal and factual, were submitted to the Court for its determination. The Court heard the evidence and arguments of counsel and found that said runoff election should be declared void since the court could not ascertain the true outcome of the June 9, 2018, City of Mission, Texas mayoral runoff election.

IT IS THEREFORE ORDERED, ADJUDGED, DECLARED AND DECREED that:

1. The official results of the June 9, 2018, City of Mission, Texas mayoral runoff election cannot be ascertained by the court and are hereby declared VOID;

6) As a result, the true outcome of the election cannot be ascertained.

Accordingly, IT IS ORDERED, ADJUDGED, and DECREED that the June 9, 2018 Mayoral Run-off for the City of Mission, Texas is void.

Pursuant to ~~Texas Election Code section 22.015(d)~~, a vacaney for the position of Mayor of the City of Mission is created as of the date of this judgment. Accordingly, it is ORDERED that as a holdover, Contestant Norberto "Beto" Salinas is entitled to hold the position of Mayor until the new election is held.

~~IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the City of Mission shall immediately order a new run-off election for the office of Mayor of Mission.~~

DATE: October 26, 2018



The Honorable J. Bonner Dorsey

Cc:

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Tab C

FILED
AT 10:49 O'CLOCK A.M.

NO. C-2637-18-B

NOV - 5 2018

NORBERTO "BETO" SALINAS
Contestant

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V.

ARMANDO O'CANA
Contestee

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LAURA HINOJOSA, CLERK
IN THE DISTRICT COURT, Hidalgo County

By

Deputy#34

93RD JUDICIAL DISTRICT

HIDALGO COUNTY, TEXAS

AMENDED FINAL JUDGMENT

From September 24, 2018 through October 5, 2018, the Court, pursuant to the Texas Election Code, conducted a trial to ascertain whether the outcome of the contested election in the above-styled and numbered cause, concerning the June 9, 2018, City of Mission, Texas mayoral run-off election between Norberto "Beto" Salinas and Armando O'Caña, as shown in the final canvass was not the true outcome of the contested election.

On said dates, the case was called for trial before the court. Contestant Salinas, appeared in person and by and through his attorneys of record and announced ready for trial. Contestee Armando O'Caña, appeared in person and by and through his attorneys of record and announced ready for trial.

All matters and controversy, legal and factual, were submitted to the Court for its determination. The Court heard the evidence and arguments of counsel and found that said runoff election should be declared void since the court could not ascertain the true outcome of the June 9, 2018, City of Mission, Texas mayoral runoff election.

IT IS THEREFORE ORDERED, ADJUDGED, DECLARED AND DECREED that:

1. The Court cannot ascertain the true outcome of the June 9, 2018, run-off election for Mayor of the City of Mission, Texas and accordingly the Court declares the election void;

2. The City of Mission, Texas, City Council shall order a new mayoral election to take place within 60 days of this order.
3. The Court denies all relief not granted in this judgment. This is a final judgment, disposes of all parties and all claims and is appealable.

SIGNED FOR ENTRY THIS 6th DAY OF November, 2018



PRESIDING JUDGE

COPIES TO:

CARLOS ESCOBAR
RICARDO "RICK" SALINAS
JOSE GARZA
MARTY GOLANDO
GILBERTO HINOJOSA
PATRICIA O'CANA

Tab D

 KeyCite Yellow Flag - Negative Treatment

Order Corrected by [Armando O'Caña v. Norberto 'Beto' Salinas](#),
Tex.App.-Corpus Christi, April 2, 2019

2019 WL 1414021

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Corpus Christi-Edinburg.

Armando O'CAÑA, Appellant,

v.

Norberto 'Beto' SALINAS, Appellee.

NUMBER 13-18-00563-CV

Delivered and filed March 29, 2019

On appeal from the 93rd District Court of Hidalgo County, Texas.

Attorneys and Law Firms

[Carlos Escobar](#), [Gilberto Hinojosa](#), for Armando O'Caña.

[Ricardo L. Salinas](#), Martin Golando, Maitreya Tomlinson, [Brandy Wingate Voss](#), [Jose Garza](#), for Norberto Beto Salinas.

Before Chief Justice [Contreras](#) and Justices [Benavides](#) and [Hinojosa](#)

MEMORANDUM OPINION

Memorandum Opinion by Chief Justice [Contreras](#)

*1 This appeal concerns the June 9, 2018 run-off election for mayor of Mission, Texas between appellant Armando O'Caña and appellee Norberto 'Beto' Salinas. O'Caña won the election but Salinas filed a contest suit. See [TEX. ELEC. CODE ANN. § 221.003](#) (West, Westlaw through 2017 1st C.S.). After a bench trial, the trial court found that the true outcome of the election could not be determined and it rendered judgment voiding the election results.

On appeal, O'Caña contends: (1) Salinas "failed to prove" that the number of illegal votes was equal to or greater

than the number of necessary votes to change the election outcome; (2) the trial court abused its discretion by allowing the testimony of Salinas's expert witness, George Korbel; (3) Salinas submitted no evidence of the results of the "final canvass" of the election; (4) the trial court abused its discretion by admitting certain evidence over O'Caña's objections; and (5) the trial court abused its discretion when it made an adverse inference against O'Caña based upon spoliation of evidence.

We conclude that the trial court's spoliation inference was erroneous and the remaining evidence was legally insufficient to support the trial court's finding that the number of illegal votes exceeded O'Caña's margin of victory. Therefore, we will reverse and render.

I. BACKGROUND

In the mayoral general election on May 5, 2018, Salinas received more than 49.9 percent of the vote, coming three votes shy of an outright majority, while O'Caña received around 41.6 percent, thereby forcing a run-off.¹ Unofficial results of the June 9 run-off election showed that O'Caña defeated Salinas by 3,475 votes to 3,318, a margin of 157. In his contest suit, filed on July 18, Salinas argued that at least 158 illegal votes were counted for O'Caña in the run-off. *See id.* § 221.003(a)(1). In particular, the petition alleged that at least 158 O'Caña voters were either (1) illegally assisted in casting their mail-in ballots (so-called "ballot harvesting"), or (2) "bribed" to cast votes for O'Caña. *See id.* § 86.010 (West, Westlaw through 2017 1st C.S.); [TEX. PENAL CODE ANN. § 36.02\(a\)\(1\)](#) (West, Westlaw through 2017 1st C.S.).

Trial took place between September 24 and October 5, 2018, during which 33 witnesses testified, many of whom were elderly voters speaking through a translator. Five witnesses testified directly that they were given money in exchange for their votes in the mayoral run-off election. These witnesses stated that they were given money by specific people with connections to the O'Caña campaign, including O'Caña's sister-in-law Lupita O'Caña. Salinas's expert witness, George Korbel, testified that, according to his examination of voting records, 48 early voters cast their ballots around the same time as the five voters who testified they were paid, and those 48 were assisted by the same people as the five paid voters.² Korbel opined that it was "very likely" that all 48 voters were paid because "if

TAB D

you pay one ... you're going to pay everybody and that's the way the world works."

*2 Fourteen other witnesses testified that their mail-in ballots, as well as the mail-in ballots of four other people, were picked up and deposited in the mail by individuals associated with the O'Caña campaign. Evidence showed that none of the carrier envelopes for the allegedly illegally harvested ballots contained the signature of an assistant.

Korbel testified that there were 27 ballots known to have been illegally harvested, and the carrier envelopes for each of those ballots had a stamp depicting a folded United States flag which appeared to come from a \$ 50 roll of stamps.³ He noted that a total of 322 mail-in ballot carrier envelopes contained the same specific type of stamp, only 19 of which contained an assistant's signature. Korbel further noted that over 90% of the folded-flag stamps received in the run-off election appeared to come from a roll—whereas only 65.8% of those stamps received in the general election appeared to come from a roll. He opined, therefore, that “[a]s many as 303” mail-in ballots may have been illegally harvested for the run-off election.

Two witnesses testified that they saw an O'Caña campaign worker, Esmeralda Lara, carrying a “big” bag of ballots. One of the witnesses, Carmen Ochoa, estimated that Lara was carrying around 200 ballots, although Ochoa previously estimated that Lara was carrying only twenty to forty ballots. Lara herself testified that she worked for the O'Caña campaign for the general election but secretly switched to work for the Salinas campaign for the run-off.

In his testimony, O'Caña denied that he and his team were involved in “a systematic and flagrant scheme to cast illegal votes.” However, he conceded that his campaign made over \$ 25,000 in expenditures to VO Consulting Services, a political consulting firm recently established by O'Caña's niece Veronica—but he did not have any documentation showing how the firm spent the funds. O'Caña also conceded that he had erased some text messages from his phone “[b]efore, during, and after” the election contest suit had already been filed, including some from Veronica, Lupita, and Lara. He explained that it was his “standard practice” to delete text messages and emails.

Nelida Solis, a process server, stated that she attempted on ten or twelve different occasions to serve subpoenas on Lupita and Veronica to appear at trial. Solis agreed

that Salinas's attorneys advised her not to attempt to serve Lupita and Veronica during a funeral of an O'Caña family member which they both attended.

The trial court found that more than 158 illegal votes were counted and, thus, the true outcome of the election could not be ascertained. On November 6, 2018, the trial court rendered judgment declaring the results of the election void and directing the Mission city council to order a new mayoral election to take place within sixty days. The trial court also made findings of fact and conclusions of law, including the following:

*3 29. The O'Caña campaign engaged in an orchestrated conspiracy to pursue illegal votes through bribing voters and harvesting mail-in ballots.

....

30. ... Dr. O'Caña admitted that he had no receipts, expenditure reports, or any other record or document that would evidence the work that VO Consulting Services performed for his campaign.

31. Dr. O'Caña also admitted he deleted his records before, during, and after this lawsuit was filed, including his communications with VO Consulting Services.... The owner of VO Consulting, Veronica O'Caña, could not be subpoena[a]led to testify at trial or via deposition, although 12 or more attempts were made.

....

36. ... The Court finds that at least 48 voters were bribed to vote for Dr. Armando O'Caña during the June run-off election, but many more voters were likely bribed.

....

39. The O'Caña campaign systematically violated the Texas Election Code by taking mail-in ballots from voters and depositing them in the mail, without signing the form on the back side of the carrier envelope to indicate assistance was rendered, making the ballots and votes illegal.

....

54. Mr. Korbel testified that based on his review of the testimony, the affidavits, election materials, and the testimony at trial, at least 27 voters had their votes harvested by members of the O'Caña campaign. Mr.

Korbel testified that the range of harvested voters was likely 27–303 voters.

....

55. I find clear and convincing evidence that the number of illegally handled mail in ballots by members of the O'Caña campaign is in excess of 150 although it is impossible to know the exact number.

56. The final canvass reflected a margin of 157 votes between the victor, Dr. Armando O'Caña, and the incumbent Mayor, Norberto “Beto” Salinas.

....

61. The precise number of illegal votes cast for Armando O'Caña for mayor in the run[-]off election of June 9, 2018, cannot be ascertained but it is in excess of 158 votes.

62. In addition to the facts found, the court engages in an adverse inference against the contestee, Dr. Armando O'Caña, because of his destruction of presumptively adverse evidence in his control, akin to spoliation. He has a duty to preserve evidence when he knows, or reasonably should know, that [(a)] there is a substantial chance that a claim will be filed, and (b) that evidence in its possession or control will be potentially relevant to that claim. The Court finds Dr. O'Caña and/or his agents intentionally destroyed the correspondence between Dr. O'Caña and his campaign workers in order to conceal relevant evidence. The Court presumes this destroyed evidence supports a finding that at least 158 votes were illegally cast.

O'Caña perfected this appeal, thereby automatically suspending execution of the trial court's judgment. *See TEX. ELEC. CODE ANN. § 232.016* (West, Westlaw through 2017 1st C.S.). We ordered the appeal accelerated pursuant to the election code. *See id. § 232.015(a)* (West, Westlaw through 2017 1st C.S.).

II. DISCUSSION

By his first issue, O'Caña argues that Salinas “failed to prove” that the number of illegal votes was equal to or greater than his margin of victory in the run-off election. We construe the issue as challenging the legal sufficiency of the evidence to support the trial court's judgment.

A. Standard of Review

*4 In reviewing a judgment in an election contest, we must determine if the trial court abused its discretion. *McCurry v. Lewis*, 259 S.W.3d 369, 372 (Tex. App.—Amarillo 2008, no pet.); *Gonzalez v. Villarreal*, 251 S.W.3d 763, 774 (Tex. App.—Corpus Christi 2008, pet. dism'd). A trial court abuses its discretion when it acts “without reference to any guiding rules and principles.” *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). “The sufficiency of evidence supporting a trial court's finding of fact may be a relevant factor in determining whether the court abused its discretion.” *Jones v. Morales*, 318 S.W.3d 419, 423 (Tex. App.—Amarillo 2010, pet. denied). In reviewing the legal sufficiency of the evidence under a clear and convincing standard, we look at all the evidence, in the light most favorable to the judgment, to determine if the trier of fact could reasonably have formed a firm belief or conviction that its finding was true. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We presume that the trier of fact resolved disputed facts in favor of its findings if a reasonable trier of fact could do so. *Id.* We disregard any contrary evidence if a reasonable trier of fact could do so, but we do not disregard undisputed facts. *Id.*

“[D]espite the heightened [clear and convincing] standard of review,” we “must nevertheless still provide due deference to the decisions of the factfinder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter when assessing the credibility and demeanor of the witnesses.” *In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014).

B. Applicable Law

In an election contest, the trial court must “attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because,” as pleaded in this case, “illegal votes were counted.” *TEX. ELEC. CODE ANN. § 221.003(a)(1)*. An “illegal vote” is “a vote that is not legally countable.” *Id. § 221.003(b)*. An election contestant has the burden of proving by clear and convincing evidence that voting irregularities were present and that they materially affected the election's results. *Flores v. Cuellar*, 269 S.W.3d 657, 660 (Tex. App.—San Antonio 2008, no pet.); *Gonzalez*, 251 S.W.3d at 773.

Under election code chapter 86, a person casting a mail-in ballot who would be eligible to receive assistance at a polling place⁴ may select a person to assist the voter in preparing the ballot. **TEX. ELEC. CODE ANN. § 86.010(a)**. Any assistance given to a mail-in voter is limited to that which is authorized by the election code for voters at a polling place,⁵ except that a mail-in voter “with a disability who is physically unable to deposit the ballot and carrier envelope in the mail may also select a person ... to assist the voter by depositing a sealed carrier envelope in the mail.” *Id.* § 86.010(b). If a person assists a voter, the assistant must sign the written oath that is part of the certificate on the voter's official carrier envelope. *Id.* § 86.010(c). If a voter is assisted in violation of these rules, the voter's ballot may not be counted. *Id.* § 86.010(d).

*5 Chapter 86 also provides that a person commits an offense by knowingly possessing an official ballot or carrier envelope provided to another, unless the person: (1) is lawfully assisting a voter who is eligible for assistance; and (2) has complied fully with the requirements of the chapter, which include the provision of the person's name, address, and signature on the reverse side of the envelope. *Id.* §§ 86.0051(b) (West, Westlaw through 2017 1st C.S.), .006(f)(4).⁶ A ballot returned in violation of section 86.006 may not be counted. *Id.* § 86.006(h).

It is a second-degree felony offense for a person to intentionally or knowingly offer, confer, or agree to confer on another, or solicit, accept, or agree to accept from another, any benefit as consideration for the recipient's vote. **TEX. PENAL CODE ANN. § 36.02(a)(1)**.⁷

If the court can ascertain the candidate for which an illegal vote was cast, the court must subtract the vote from the candidate's official total. **TEX. ELEC. CODE ANN. § 221.011(a)** (West, Westlaw through 2017 1st C.S.). If the court finds that illegal votes were cast but cannot ascertain which candidate the illegal votes were cast for, it shall consider those votes in making its judgment. *Id.* § 221.001(b). If the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election, the court may declare the election void without attempting to determine how individual voters voted. *Id.* § 221.009(b) (West, Westlaw through 2017 1st C.S.).

C. Waiver

We first address Salinas's contention, made in his appellate brief, that O'Caña waived his legal sufficiency issues because he “does not directly attack or identify any specific findings of fact he is challenging for legally insufficient evidence—rather, he generally attacks the judgment and the evidence.” *See In Interest of M.W.*, 959 S.W.2d 661, 664 (Tex. App.—Tyler 1997, writ denied) (“In an appeal from a nonjury trial, an attack on the sufficiency of the evidence must be directed at specific findings of fact, rather than at the judgment as a whole.”); *Katz v. Rodriguez*, 563 S.W.2d 627, 631 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (“Unless the trial court's findings of fact are challenged by point of error on appeal, ... they are binding on the appellate court.”); *see also Milton M. Cooke Co. v. First Bank & Tr.*, 290 S.W.3d 297, 303 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (“[W]e will overrule a challenge to fact findings that form the basis of a conclusion of law or disposition when the appellant does not challenge other fact findings that support that conclusion or disposition.”).

We disagree that the issues have been waived. Although O'Caña's initial appellate brief does not refer to individual findings of fact by number, the issues raised and the arguments made in support thereof make clear that he is challenging the trial court's central findings regarding the quantity of illegal ballots cast. In particular, O'Caña's first issue disputes the finding that more than 158 illegal votes were counted. Further, there are no unchallenged findings of fact which would independently support the judgment. Cf. *Milton M. Cooke Co.*, 290 S.W.3d at 303. Accordingly, the issues have not been waived.

D. Spoliation Inference

*6 As part of our consideration of O'Caña's first issue, we consider the arguments made in his fifth issue, in which he contends that the trial court erred by making an “adverse inference” against him based on his testimony that he deleted text messages on his phone “[b]efore, during, and after” the election contest was filed.

We review the trial court's legal determination of whether a party spoliated evidence for an abuse of discretion. *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 27 (Tex. 2014). The party seeking a remedy for spoliation must demonstrate that the other party breached its duty to preserve material and relevant evidence. *Id.* at 20. A duty

to preserve evidence exists when (1) a party knows or reasonably should know that there is a substantial chance a claim will be filed; and (2) the evidence is relevant and material. *Id.*; *Miner Dederick Const., LLP v. Gulf Chem. & Metallurgical Corp.*, 403 S.W.3d 451, 465 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). A party knows or reasonably should know that there is a substantial chance a claim will be filed if a reasonable person would conclude from the severity of the incident, and other circumstances surrounding it, that there was a substantial chance for litigation at the time of the alleged spoliation. *Miner Dederick*, 403 S.W.3d at 465. A “substantial chance of litigation” arises when “litigation is more than merely an abstract possibility or unwarranted fear.” *Brookshire Bros.*, 438 S.W.3d at 20.

In this case, O'Caña testified that, as a matter of routine practice, he deleted some texts from his phone, including some from people associated with his campaign and alleged to have engaged in bribery and harvesting. He stated he deleted the texts “before, during, and after” the election contest suit was filed. Salinas did not request a spoliation inference during trial—instead, he first suggested it in his proposed conclusions of law. The trial court found that “O'Caña and/or his agents^[8] intentionally destroyed the correspondence ... in order to conceal relevant evidence,” but the court refused to make an explicit finding that O'Caña had a duty to preserve evidence at the time he deleted the texts, despite the fact that Salinas included exactly such a finding in his proposed conclusions of law.

We find no evidence in the record that litigation was more than “an abstract possibility” prior to the time the election contest suit was filed; accordingly, O'Caña had no duty to preserve communications prior to that time. *See id.* There was no evidence that Salinas requested a recount, and he did not file his election contest until 39 days after the election was held. Further, we find no direct evidence in the record establishing that the texts which O'Caña deleted after the contest was filed were in any way relevant to any issues within the court's scope of inquiry in the election contest. *See Diaz v. Valadez*, 520 S.W.2d 458, 459 (Tex. Civ. App.—Corpus Christi 1975, no writ) (noting that “in an election contest only such matters happening on the day of the election and pertaining strictly to the election may be inquired into or determined by the trial court”); *see also Estrada v. Adame*, 951 S.W.2d 165, 168 n.2 (Tex. App.—Corpus Christi 1997,

orig. proceeding) (same). Intentional spoliation “may, absent evidence to the contrary, be sufficient by itself to support a finding that the spoliated evidence is both relevant and harmful to the spoliating party.” *Brookshire Bros.*, 438 S.W.3d at 15. But here, Salinas's counsel did not ask O'Caña, Lara, or any other witness about the content of the deleted texts, nor did he show that the content of those texts was undiscoverable by other methods. Moreover, O'Caña testified that he deletes his text messages and emails on a regular basis because he “get[s] over a thousand text messages constantly, emails the same thing.” Because he regularly deleted his texts and emails, any such correspondence remaining after the election contest was filed would not have constituted evidence of a “conspiracy” to obtain illegal votes arising prior to the election, as Salinas alleges.

*7 We find that Salinas failed to meet his burden to show that O'Caña breached a duty to preserve material and relevant evidence. *See id.* at 20. The trial court could not have reasonably concluded merely from O'Caña's testimony that O'Caña harbored the specific intent to “conceal discoverable evidence” when he deleted the texts at issue. *See Knoderer v. State Farm Lloyds*, 515 S.W.3d 21, 35 (Tex. App.—Texarkana 2017, pet. denied).

We note further that, while the trial court's discretion to remedy an act of spoliation is broad, it is not limitless. *Petroleum Sols., Inc. v. Head*, 454 S.W.3d 482, 489 (Tex. 2014). In the jury trial context, a trial court may only submit a spoliation instruction “if it finds (1) the spoliating party acted with intent to conceal discoverable evidence, or (2) the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense.” *Knoderer*, 515 S.W.3d at 35; *see Brookshire Bros.*, 438 S.W.3d at 23 (“A party must intentionally spoliate evidence in order for a spoliation instruction to constitute an appropriate remedy.”). Therefore, as with any sanction, before instructing a jury on spoliation, the trial court must find “that a lesser remedy would be insufficient to ameliorate the prejudice caused by the spoliating party's conduct.” *Brookshire Bros.*, 438 S.W.3d at 19.

A spoliation inference is a sanction akin to a jury instruction. And here, in light of the fact that there was direct evidence of only 31 illegal votes in an election with a victory margin of 157, the spoliation inference likely had

a major influence on the trial court's final ruling—and it may even have been dispositive. *See id.* at 23 (observing that the submission of a spoliation instruction may, at least in some instances, be “tantamount to a death-penalty sanction”).⁹ Nevertheless, there is no indication that any lesser sanctions were considered or tested in this case, and the trial court did not make any finding that a lesser remedy would be insufficient to ameliorate the prejudice that may have been caused by O'Caña's conduct. *See id.*

The dissent suggests that “Salinas's inability to question Veronica O'Caña may serve as a basis to support” the spoliation inference. This suggestion goes far beyond the trial court's factual findings. It relies on an assumption that O'Caña or his attorney controlled Veronica to the extent that they had the ability to compel her presence at trial, a finding the trial court did not make and which is not supported by the record. Regardless, the process server's testimony regarding her failed attempts to serve subpoenas on O'Caña's family members does not support the trial court's finding that “Dr. O'Caña and/or his agents intentionally destroyed the correspondence between Dr. O'Caña and his campaign workers.” And neither Salinas nor the dissent cite any authority establishing that a party's inability to serve subpoenas on potential witnesses would independently allow the trial court to make inferences adverse to the other party.

*8 Under these circumstances, we conclude that the trial court abused its discretion by making an adverse inference based on intentional spoliation. We sustain O'Caña's fifth issue, and we do not consider the adverse inference in our legal sufficiency analysis.

E. Analysis

O'Caña argues by his first issue that the evidence did not support the trial court's finding that more than 158 illegal ballots were cast in the June 9, 2018 mayoral run-off election. He contends that, even if the trial court credited all the testimony regarding alleged bribery and voting harvesting, the maximum number of illegal votes is less than his victory margin of 158; therefore, the trial court could not have concluded that the outcome of the election was unascertainable.¹⁰

*9 In response, Salinas notes that the direct testimony of the individual voters that they were bribed or their ballots were harvested is not the only evidence of illegal votes in

this case. Instead, there was also circumstantial evidence supporting the trial court's finding that more than 158 illegal votes were counted. Specifically, Salinas points to Korbel's testimony, based on the timing of early votes and identity of assistants, that 48 voters were “likely” bribed; and his testimony, based on the stamps used on mail-in ballot carrier envelopes, that anywhere from 27 to 303 ballots were illegally harvested.

Salinas further points to Carmen Ochoa's testimony as supportive of the judgment. Ochoa stated that she saw Lara carrying “a bunch of ballots in her hand” at an assisted living facility for elderly residents. In addition to Ochoa's testimony, Maribel Salinas also testified that she saw Lara carrying a “bag” of mail-in ballots at an assisted living facility. Salinas contends that Maribel's testimony alone supports the judgment since a “bag” of ballots could potentially “hold more than 150 ballots.”

First, we consider evidence of bribed votes. By this Court's count, five witnesses testified directly that they were paid for their votes; those five witnesses further provided clear, direct testimony establishing that eight other voters were paid for their votes. The trial court did not abuse its discretion in finding by clear and convincing evidence that these 13 votes were illegally cast.

However, Korbel's testimony regarding the “very likely” quantity of additional bribed votes does not meet the exacting standard of “clear and convincing.” Korbel stated that 48 early voters cast their ballots around the same time as the five voters who testified they were paid, and were assisted by the same people as those five voters. Korbel opined that all 48 voters were also paid; but he based that opinion on an “assumption” that “if you pay one ... you're going to pay everybody and that's the way the world works.” He did not explain the underlying basis for this assumption, and though Korbel is undoubtedly an expert in election analyses concerning racially polarized voting, there is nothing in his background that would indicate an expertise in vote bribery. His testimony that “if you pay one ... you're going to pay everybody” is unsupported by any factual basis or underlying reasoning. This conclusory testimony is not probative. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009) (noting that if no basis for an expert opinion is offered, or the basis offered provides no support, the expert opinion is merely a conclusory statement and cannot be considered

probative evidence; i.e., a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness).

We next turn to the issue of harvested ballots. Fourteen witnesses testified that their mail-in ballots were picked up and deposited in the mail by unrelated people whose signatures did not appear on the carrier envelope. There was also direct testimony of four additional harvested ballots. Therefore, there was direct testimony as to 18 harvested ballots, and the trial court did not abuse its discretion in finding by clear and convincing evidence that these votes were illegal.

Considering direct evidence of both bribed votes and harvested ballots, there were at most 31 votes for which there was clear and convincing evidence of illegality—far short of the amount which would cast doubt on the results of the election. This case therefore hinges on the circumstantial evidence of illegal votes.

That evidence includes Korbel's opinion regarding the quantity of harvested ballots, which was based on his analysis of the stamps appearing on the mail-in ballot carrier envelopes. Korbel stated that there were 27 ballots known to have been harvested, and each of their carrier envelopes had a folded-flag stamp which appeared to come from a \$ 50 roll. He stated, based on his examination of all mail-in carrier envelopes in the run-off election, that 303 of those envelopes had the same folded-flag roll stamp and were not signed by an assistant. He opined that “no poor person would buy a roll of stamps for \$ 50,” so the total number of illegally harvested ballots could be as many as 303.¹¹

*¹⁰ Korbel's opinion was founded on several layered inferences and assumptions. In particular, he seems to assume that all of the mail-in voters in Mission are “poor” and therefore could not afford a \$ 50 roll of stamps. This assumption was critical to Korbel's inference that some or all of the envelopes bearing the folded-flag roll stamp were subject to illegal harvesting. Without this assumption, there would be no reason to believe that an envelope bearing a particular type of stamp is any more or less likely to have been cast due to illegal harvesting.

Election code chapter 82 explains that a person is eligible to vote by mail-in ballot if the person: (1) is 65 years of age or older on election day; (2) expects to be absent from the person's county of residence on election day and

during the regular in-person early voting hours; (3) has a sickness or physical condition that prevents appearance at the polling place on election day without a likelihood of needing personal assistance or of injuring the person's health; or (4) is confined in jail and is otherwise eligible to vote. [TEX. ELEC. CODE ANN. §§ 82.001–.005](#) (West, Westlaw through 2017 1st C.S.). A mail-in voter must meet one of these four conditions, but Korbel did not elucidate any reason to assume that a mail-in voter must be economically destitute. His testimony to that effect was merely his *ipse dixit*, and it is non-probative for that reason. See *City of San Antonio v. Pollock*, 284 S.W.3d at 881. Korbel also appears to have assumed that all illegally harvested votes were cast in favor of O'Caña. However, many of the witnesses that testified their ballots were illegally harvested did not specify who they voted for; and of those who did testify as to who they voted for, more stated they voted for Salinas than for O'Caña.¹²

Even assuming that no Mission voters are capable of affording a \$ 50 roll of stamps, Korbel's testimony simply did not justify a reasonable inference that, if a mail-in ballot contains a stamp from a \$ 50 roll and no assistant's signature, that stamp must have been placed there by an unauthorized person. This conclusion does not rest, as the dissent argues, on an implicit assumption that 357 voters “each individually and independently purchased a \$ 50 roll of identical stamps.” It was Salinas's burden to establish the requisite number of illegal votes by clear and convincing evidence. See *Flores*, 269 S.W.3d at 660. The evidence showed that there were 303 envelopes with rolled folded-flag stamps that did not contain an assistant's signature, but Korbel seems to have entertained only two possibilities for why that may have occurred: (1) each of the 303 voters individually and independently purchased a \$ 50 roll of identical stamps, or (2) rampant fraud occurred. Korbel's inference that all of those ballots may have been illegally harvested was based entirely on his assumption that, because the first possibility is highly unlikely, the second possibility must be the truth. This is a false dichotomy, however, because there are other eminently plausible reasons for this scenario which comport with the law. For example, a mail-in voter could have personally brought a completed ballot to a post office and purchased an individual stamp from a clerk; or a mail-in voter could have given his or her ballot to a family member or co-dweller to stamp and mail. See [TEX. ELEC. CODE ANN. § 86.006\(f\)\(1\), \(2\)](#). In either case, the existence of a rolled folded-flag stamp on the voter's

carrier envelope would say absolutely nothing about whether the ballot was illegally harvested or otherwise not legally countable.

***11** There was other circumstantial evidence upon which the trial court found more than 13 bribed votes. In particular, O'Caña stated that his campaign paid over \$25,000 to his niece's newly-established political consulting firm, but he did not obtain any documentation showing how the firm spent the funds. In addition, as noted, Ochoa and Maribel Salinas each testified that they saw Lara carrying a bag of ballots. At trial, Ochoa guessed that Lara was carrying around 200 ballots.¹³ O'Caña argues that Ochoa's estimate of the quantity of ballots possessed by Lara could not serve as clear and convincing evidence because Ochoa characterized that testimony as a "guess."¹⁴ We agree. "[F]indings based on evidence that allows for no more than speculation—a guess—are based on legally insufficient evidence." *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 229 (Tex. 2011). Though we must defer to the trial court's credibility determinations, we cannot say that Ochoa's "guess," even when combined with Maribel Salinas's testimony and the other circumstantial evidence, constitutes "clear and convincing" evidence that more than 18 O'Caña votes were illegally harvested.

After considering the entire record, we conclude that there was legally insufficient evidence to support the trial court's finding, by clear and convincing evidence, that the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of the election. See **TEX. ELEC. CODE ANN. § 221.012(b)**. The trial court could not have formed a firm belief or conviction in this finding based only on the evidence adduced at trial. See *In re J.F.C.*, 96 S.W.3d at 266. In light of the foregoing, we further conclude that the trial court abused its discretion in rendering judgment voiding the election results. See *McCurry*, 259 S.W.3d at 372. O'Caña's first issue is sustained. We need not address his other issues as they are not dispositive. See **TEX. R. APP. P. 47.1**.

III. CONCLUSION

Election fraud perverts democracy and constitutes a grave offense, not only against the opposing candidate but against society as a whole. Still, in an era when State and federal elected officials seek to sow doubt and mistrust

of government by grossly exaggerating the prevalence of illegal voting, we must also remain vigilant to safeguard a voter's right to have his or her lawful vote counted. The Texas Legislature has prescribed a heightened standard of proof in election contests for precisely this reason.¹⁵

***12** This case has uncovered clear and convincing evidence of election fraud, resulting in at least 31 illegal ballots being cast. This is extremely troubling. But the evidence in this case showed that both candidates benefitted from these irregularities. In any event, our inquiry in this proceeding is not to determine whether crimes have been committed, nor is it to determine whether there was a "conspiracy" to obtain illegal votes, as Salinas alleges—we confidently leave those questions to the able hands of the criminal justice system. Our sole task here is to decide whether the trial court abused its discretion in finding clear and convincing evidence of more than 157 illegal votes. As illustrated herein, the trial court's conclusion relied on unreasonable inferences and unsupported assumptions. To find that a rational trier of fact could have formed a "firm belief or conviction" that 157 illegal votes were cast, based on this record, would contravene the legislature's clear intent that strong, clear proof must be adduced before a facially valid vote is discarded. Accordingly, in light of the entire record—and mindful of our solemn duty to preserve and protect the integrity of the election process through faithful application of the law—we cannot say that the trial court acted within its discretion when it concluded that the heightened standard has been met in this case.

We reverse the trial court's judgment declaring the results of the June 9, 2018 Mission mayoral run-off election void, and we render judgment denying Salinas's election contest suit. In order to expedite final resolution of this matter, no motion for rehearing will be entertained. See **TEX. ELEC. CODE ANN. § 232.014(e)** (West, Westlaw through 2017 1st C.S.).

DISSENTING MEMORANDUM OPINION

Dissenting Memorandum Opinion by Justice Hinojosa.

The majority sustains two issues asserted by Dr. Armando O'Caña, the contestee below and appellant before us. It sustains O'Caña's fifth issue, which contends that the

trial court abused its discretion in finding that O'Caña spoliated evidence and making a spoliation inference, and his first issue, which contends that Norberto ‘Beto’ Salinas, the contestant below and appellee before us, “failed to prove” that the number of illegal votes was equal or greater than the number of necessary votes to change the election outcome.

Fundamentally, the majority errs in sustaining O'Caña's legal sufficiency challenge by, among other things, reading the “clear and convincing” burden of proof Salinas bore at trial to mean that Salinas was obligated to prove for whom each illegal vote was cast. This is a review we would employ had the trial court rendered a judgment declaring

Early In-Person Vote Mail-In Ballot

Election Day

Total

Salinas	2,138	234	713	3,085
O'Caña	1,666	269	636	2,571
Jamie Gutierrez	308	26	185	519

This tally necessitated a runoff between Salinas and O'Caña. The results of the June 9, 2018 runoff election provided:

Early In-Person Vote Mail-In Ballot Election Day Total

Salinas	2,197	272	849	3,318
O'Caña	2,189	393	893	3,475

On July 18, 2018, Salinas filed his original petition for election contest. A bench trial began on September 24, 2018. At trial, Salinas presented direct, circumstantial, and expert evidence in support of his allegations that O'Caña's 158 vote margin¹ resulted from O'Caña's campaign bribing voters and harvesting mail-in ballots.

A. Bribing Voters

Samuel “Benji” Tijerina manages Top Gun Sprinters, a business that rents luxury Mercedes Benz Sprinter vans for special occasions. Tijerina testified that, around the time of the runoff election, Veronica O'Caña, O'Caña's niece and proprietor of recently formed VO Consulting, rented a van from Top Gun Sprinters for the sole purpose of shuttling voters to the polls. The van's windows had “limo tint,” which prevented individuals outside from seeing

inside unless their face was pressed against a window. Veronica paid Tijerina the rental fee for the Sprinter van in cash during a brief encounter in a parking lot.

*13 Samuel James Deckard, one of the voters ferried in a Sprinter van, testified about his encounters with O'Caña's campaign. Deckard's trial testimony mirrored that of a pre-trial affidavit he executed. In Deckard's affidavit, which was admitted at trial, he avers:

On 4/28/18 Benji Tijerina contacted me on Facebook Messenger. He asked me ‘Yo bro does any of your family wanna [sic] vote I will pay tem [sic] 10 bucks free transportation less then 3 mins’. I told him I would vote.

On 5/1/18, Benji messaged me on Facebook Messenger with ‘U ready to vote bro.’ I said I was at city hall. He called me on Facebook Messenger and told me to meet them at Whataburger on Old 83 in Mission, Texas. I

Salinas the winner. Instead, the trial court found that it could not determine the true outcome of the election and ordered a new trial. I believe Salinas presented legally sufficient evidence under a clear and convincing standard of this applicable finding. Therefore, I respectfully dissent.

I. BACKGROUND

Salinas, the incumbent mayor, and O'Caña, a city councilmember, had twice competed against each other in mayoral elections before the 2018 mayoral election. The results of the May 5, 2018 general election provided:

met them there. I left my car at Whataburger and got into their white Mercedes van. In the van, were people working the O'Caña campaign. These people were Benji Tijerina, Jesus Rodriguez (the driver), the brother to Jesus Rodriguez (I don't know his name but was shown a picture of Charlie Rodriguez and identified him as the brother), and an older gentleman (I don't know his name either but was shown a picture and identified him as Jesse Lopez). After they picked me up, they went and picked up a few more people They then drove us to Mission City Hall. The van stopped at the O'Caña campsite and Charlie Rodriguez and Jesus Lopez got out of the van. Cindy Pacheco then entered the van. I don't know her by name, but was shown a picture of her and identified her. She coached us and told us that we needed to say that we needed assistance to vote and that we wanted Cindy to assist us. We then voted from inside the van and Cindy Pacheco assisted us in voting. Once we finished voting, Cindy then told the driver, Jesus Rodriguez, 'Yes, they voted. You can pay them.' They then dropped me off at my dad's house ..., the driver Jesus Rodriguez paid me \$ 10.

On 6/1/18, Jesus Rodriguez contacted me on Facebook Messenger stating 'hey it's benji's cousin I was wondering if you an[d] your wife wanted to come vote again.' I didn't respond. He then showed up to my house in the van. He got off the van and came to my door and told me that this time they were paying \$ 20 a vote and if I got 3 more votes they would pay me \$ 60 to \$ 80 more plus the \$ 20 for each voter. Jesus Rodriguez then coached me to ask for assistance and ask for Lupita [O'Caña]. I didn't remember Lupita's name, but when shown a picture I was able to identify her. After we voted, they brought food to the [sic] told us if we know anyone else that wants to vote there is plenty of food. I asked them to take me to the store and they said they could not because it would have looked suspicious. They also told us to turn off our phones as soon as we got in the van. They then dropped me off at my dad's house Jesus Rodriguez then gave the money to Charlie Rodriguez and then Charlie Rodriguez gave the money \$ 20 to me.

Dolores Gomez, Pamela Durr, and Arnulfo Navarro also testified that they were paid by O'Caña's campaign to vote for him. Durr and Gomez recalled that, like Deckard, they were ferried to the polls in a van, told to ask the poll workers for assistance, voted with assistance of an O'Caña's campaign worker in the privacy of the van,

and were paid for their vote. Durr identified Guadalupe "Lupita" O'Caña as the O'Caña campaign worker who instructed her and two other voters in the van to request her assistance with voting. After voting, Durr was paid \$ 20. Gomez testified that Gloria Trevino, an O'Caña campaign worker, repeatedly called her and then showed up at Gomez's house unannounced. Trevino transported Gomez to the polls. Gomez further testified that Trevino paid her, her husband, her son, and her daughter-in-law \$ 10 each to vote for O'Caña. Navarro recalled that he and two of his brothers—Jaime and Ezequiel—were each paid \$ 20 for their vote by the O'Caña campaign.

B. Mail-In Ballot Harvesting

*14 Numerous witnesses,² including Emeterio Gutierrez, testified as to illegal mail-in ballot harvesting by the O'Caña campaign. Gutierrez, an eighty-two year-old Mission resident, resides at the Palms Plaza, an apartment complex for elderly individuals. Gutierrez testified that Esmeralda Lara, an O'Caña campaign worker of questionable allegiance,³ presented him with a June 9, 2018 runoff mail-in ballot and obtained his signature on a carrier envelope. The carrier envelope that Gutierrez signed, admitted by the trial court, was mailed using a stamp that bears the image of a folded American flag (folded flag stamp); it is marked "rec'd May 24, 2018." The back of Gutierrez's carrier envelope contains an instruction before Gutierrez's signature that provides, "**Instructions to Voter:** Seal this envelope, and then sign your name in the space below. This envelope must be sealed by the voter before it leaves the voter's hands. Do not sign this envelope unless the ballot has been marked by you or at your direction." Gutierrez testified that Lara took the ballot and accompanying envelopes before he had the opportunity to mark the ballot or place a stamp on it. Moreover, Gutierrez observed Lara visiting other residents at the Palms Plaza apartments even though neither she nor any of her family members reside there.

Carmen Ochoa testified that she encountered Lara exiting the office at La Posada apartments, an assisted living facility for elderly individuals, while Ochoa paid her uncle's monthly rent. Ochoa saw Lara "with a bunch of ballots in her hand," which at trial Ochoa estimated to be approximately 200.

Maribel Salinas, Salinas's daughter, testified that she witnessed Lara walking around the En Aqua Village, a senior housing community, with ballots in a shoulder bag.

None of the carrier envelopes for the runoff election admitted at trial indicate that Lara assisted voters with completing his or her ballot.

C. Expert Testimony

Salinas retained George Korbel, an attorney, to provide expert opinions on election analysis and Texas election law. Korbel's opinions may be broadly classified into three categories: (1) an anomalous mayoral runoff election; (2) bribing voters by O'Caña's campaign; and (3) harvesting mail-in ballot by O'Caña's campaign. To form his opinions in this case, Korbel reviewed historical election data, interviewed witnesses, reviewed affidavits and declarations, and listened to the in-court testimony.

1. Anomalous Election

Korbel concluded that the runoff election was anomalous in two ways. First, voter participation increased from the general to the runoff election. Specifically, 618 more votes were cast in the runoff election than in the general election. According to Korbel, Mission had not experienced such an increase since 2004. In recent Hidalgo County history, only two municipal elections evidenced increased turnout in a runoff election: the City of Mercedes in 2011 and the City of Hidalgo in 2016. Korbel emphasized that the 2016 city of Hidalgo election led to individuals being arrested on suspicion of voter fraud. Second, 665 mail-in ballots were cast in the run-off election. This figure represents a 136 increase in mail-in ballots over the general election and is the largest number of mail-in ballots in any election in Mission history.

Second, O'Caña performed better in the runoff in every category of votes. O'Caña's elevated performance was most pronounced in mail-in votes. He received 269 mail-in votes in the general election and then 393 mail-in votes in the runoff election, a 46 percent increase in mail-in ballots. On the other side of the ballot, Salinas received 234 mail-in votes in the general election and then 272 mail-in votes in the runoff election, a 16 percent increase in mail-in ballots.

2. Bribing Voters

*15 Korbel accepted as true the testimony of Deckard, Gomez, Durr, and Navarro that they and their family members were bribed by the O'Caña campaign to vote for him and were assisted by an O'Caña campaign worker to ensure that they all voted for him. Korbel then matched Deckard, Gomez, Durr, and Navarro and their family members to Guadalupe O'Caña, Laura Rodriguez, or Veronica O'Caña. These O'Caña campaign workers ensured that Deckard, Gomez, Durr, and Navarro voted for O'Caña during the runoff election. Using the combination voter forms, Korbel identified a total of forty-eight voters who cast their ballots in close temporal proximity to Deckard, Gomez, Durr, and Navarro and their family members.

3. Mail-in Ballot Harvesting

Korbel's opinion regarding illegal mail-in ballot harvesting by the O'Caña campaign is based upon the testimony of several witnesses, including Gutierrez, who testified that their ballots were taken by O'Caña campaign workers, and whose ballots were mailed using the folded flag stamp. He focused on the folded flag stamp and its presence on carrier envelopes from the voters who testified that they voted with the assistance of O'Caña campaign workers even though no assistance was noted on the carrier envelopes. Korbel observed that, like the one affixed to the carrier envelope that Lara took from Gutierrez, 357 carrier envelopes in the runoff election bore the same folded flag stamp. Korbel testified that this particular folded flag stamp may be purchased in a roll of 100 for \$ 50 or in a book of 20 for \$ 10. Stamps that come from a roll of 100 will have perforations on the sides whereas stamps that come from a book of twenty will have perforations on the top and bottom as well as on the sides. Reviewing the 357 carrier envelopes received by the election administrator during the runoff election for this distinction, Korbel opined that 322 carrier envelopes were affixed with a folded flag stamp that came from a roll. Further, only 19 of these envelopes were marked as receiving voter assistance. Thus, 303 carrier envelopes which were mailed using a folded flag stamp from a roll were not marked as receiving voter assistance.

Korbel observed that, of the carrier envelopes mailed in the general election using the folded flag stamp, 79 came

from a roll and 41 came from a book. This yielded a ratio of 65.8 percent roll stamps to 34.2 percent book stamps. He further observed that of the carrier envelopes mailed in the runoff election using the folded flag stamp, 322 came from a roll and 35 came from a book. This yielded a ratio of 90 percent roll stamps to 10 percent book stamps.

D. Judgment

In the trial court's final judgment, it declared that it could not ascertain the runoff election's true outcome and declared the election void. Later, it signed findings of fact and conclusions of law. O'Caña did not seek additional findings, and he did not move for a new trial. This accelerated appeal followed.

II. DISCUSSION

Following the order employed by the majority, I begin with O'Caña's fifth issue regarding the trial court's finding of spoliation and making of an adverse inference before addressing his first issue regarding his legal sufficiency challenge.⁴

A. Spoliation

*16 Over the course of the trial, Salinas highlighted two instances in which he alleged that O'Caña spoliated evidence. First, Salinas elicited testimony from O'Caña that, as a matter of standard practice, O'Caña deleted communications between him and campaign workers or supporters, including Jesus "Jesse" Rodriguez, Elizabeth Hernandez, Esmeralda Lara, Veronica O'Caña, Laura Rodriguez, and Guadalupe "Lupita" O'Caña. At trial, O'Caña admitted that records of those conversations were deleted or lost "before, during, and after" Salinas's lawsuit was filed. Nevertheless, before Salinas filed suit, O'Caña was aware of investigative efforts into the runoff election. On direct examination by Salinas's counsel O'Caña testified:

Q. After the lawsuit was filed—let me go back. Before the lawsuit was filed, were you aware that there were people asking—the constituents, your constituents, for affidavits or information concerning the election?

A. Yes, I got a lot of phone calls from people.

Q. Okay. And that would have been before the lawsuit was filed?

A. No—yeah, before the lawsuit, yes, sir.

Second, Salinas contended that Veronica O'Caña and Guadalupe O'Caña evaded service of subpoenas on ten different occasions. In legal conclusion 62, the trial court writes:

In addition to the facts found, the court engages in an adverse inference against the contestee, Dr. Armando O'Caña, because of his destruction of presumptively adverse evidence in his control, akin to spoliation. He has a duty to preserve evidence when he knows, or reasonably should know, that [(a)] there is a substantial chance that a claim will be filed, and (b) that evidence in its possession or control will be potentially relevant to that claim. The Court finds Dr. O'Caña and/or his agents intentionally destroyed the correspondence between Dr. O'Caña and his campaign workers in order to conceal relevant evidence. The Court presumes this destroyed evidence supports a finding that at least 158 votes were illegally cast.

In O'Caña's fifth issue, he complains that the trial court abused its discretion in making legal conclusion 62. Salinas responds that O'Caña has waived his spoliation complaint by not detailing how the adverse inference allegedly led to the rendition of an improper judgment and by not requesting additional findings regarding his vicarious liability for "agents."

Current Texas law governing a spoliation inference in a jury trial provides that a "substantial chance of litigation" arises when "litigation is more than merely an abstract possibility or unwarranted fear." *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 20 (Tex. 2014) (quoting *Nat'l Tank*

Co. v. Brotherton, 851 S.W.2d 193, 204 (Tex. 1993). The majority finds “no evidence in the record that litigation was more than ‘an abstract possibility’ prior to the time the election contest suit was filed; accordingly, O’Caña had no duty to preserve communications prior to that time.” Slip Mem. Op., at 12. It does not address whether Salinas’s inability to question Veronica O’Caña may serve as a basis to support legal conclusion 62. I respectfully disagree with the majority’s holding. Assuming, without deciding, that O’Caña adequately preserved his spoliation complaint, I conclude that the trial court did not abuse its discretion in making a spoliation inference.

1. Deleted Communications

The allegation of bribing voters is so serious that, if true, it is criminal. See **TEX. PENAL CODE ANN. § 36.02** (West, Westlaw through 2017 1st C.S.). Nevertheless, in this civil election contest case, the trial court found as follows in factual findings 31–33:

Dr. O’Caña also admitted he deleted his records before, during, and after this lawsuit was filed, including his communications with VO Consulting Services. He testified he had no receipts or other records showing what VO Consulting Services spent money on for his campaign. The owner of VO Consulting, Veronica O’Caña, could not be subpoenaed to testify at trial or via deposition, although 12 or more attempts were made.

*17 Veronica O’Caña rented a luxurious white Mercedes Benz van to use during the campaign for \$ 500 cash. It was used to solicit prospective voters to be bribed to vote for O’Caña. Six voters testified they were solicited by O’Caña workers to vote for their candidate for \$ 20 each, with an added bonus if they could bring more voters in to be bribed. They all testified they were picked up by a white Mercedes van and taken to the voting place, where a worker came on board and got permission to assist them in their voting. After they had voted with assistance, they were paid \$ 20 each and taken home. One bribed voter testified that while in the van, he heard a campaign worker asking others on his cell phone to vote for a \$ 20 bribe.

The direct testimony of fact witnesses was that the O’Caña campaign bribed at least 18 voters.

On appeal, O’Caña has no quarrel with these findings. *Katz v. Rodriguez*, 563 S.W.2d 627, 631 (Tex. Civ. App.—Corpus Christi 1977, writ ref’d n.r.e.) (“Unless the trial court’s findings of fact are challenged by point of error on appeal, … they are binding on the appellate court.”). Because O’Caña does not challenge these factual findings, they are binding. *See id.*

The trial court found, among other things, that O’Caña deleted his communications *after* Salinas filed suit. This alone supports a spoliation finding because litigation had already arisen contrary to the majority’s finding that litigation was a mere “abstract possibility.” Cf. *Aldridge*, 438 S.W.3d at 20. Moreover, O’Caña admitted to knowing of investigative efforts into the runoff election *before* Salinas’s suit was filed.⁵ Given the gravity of the allegation of bribing voters, the sanctity of our electoral process, the pervasive tactics on the part of the O’Caña campaign—all of which the trial court believed and O’Caña does not challenge—I would conclude that litigation was “more than merely an abstract possibility or unwarranted fear” when O’Caña deleted his communications with his campaign workers. *Aldridge*, 438 S.W.3d at 20. Accordingly, I believe that O’Caña was under a duty to preserve communications for the period of time during which the trial court believed that O’Caña’s campaign workers bribed voters.

2. Salinas’s Inability to Question Veronica O’Caña

On appeal, O’Caña complains that he should not bear a spoliation inference when there was no evidence relating to whether he maintained an agency relationship with any campaign worker. O’Caña references only one case, *GTE S.W., Inc. v. Bruce*, 998 S.W.2d 605, 617 (Tex. 1999), in support of his argument. I believe that legal conclusion 62 encompasses Salinas’s inability to serve a subpoena on Veronica O’Caña and obtain campaign records that she should have possessed. According to the trial court’s findings, Veronica O’Caña played a critical role in O’Caña’s campaign. In addition to the findings referenced in the previous subsection, the trial court also found:

In March 2018 Dr. O’Caña hired VO Consulting Services to handle his logistics and operations for his mayoral campaign. VO Consulting Services was a newly fashioned political operative firm run by Dr. O’Caña’s

niece, Veronica O'Caña, which she formed on March 14, 2018. VO Consulting Services was in charge of public and digital outreach for the O'Caña campaign.

Dr. O'Caña raised in excess of \$ 38,000 for his mayoral race. He estimated that he spent 80% of that money on VO Consulting Services. Yet, Dr. O'Caña admitted that he had no receipts, expenditure reports, or any other record or document that would evidence the work that VO Consulting Services performed for his campaign.

(factual findings 29–30). The trial court also considered Salinas's efforts in securing Veronica O'Caña's testimony:

*18 [SALINAS'S COUNSEL]: Your Honor, I'd like to address an issue that may affect the way we get started this morning.

....

Okay. On Saturday, I had called [O'Caña's lead counsel] asking him for the number of a colleague. It was a cordial conversation regarding a—a pending matter out of Cameron County, and I had called him asking him for his number. He had informed me about the situation with Mrs. Lara, and I took care of that situation with Mrs. Lara. We had not made that announcement yesterday. And yesterday, last night, I sent her a text that I needed her to be here at 10:30. She texted back, said, thank you, I will be there. Okay. I figured the first two witnesses we were going to start off with this morning was Mrs. Veronica O'Caña, V.O. Consulting, and Lupita O'Caña.

....

So yesterday I got a phone call from [O'Caña's lead counsel], my friend—he's still my friend—at 8:09 in the morning. We were scheduled to start at 9:30. He asked me to please not to get these people served over at the funeral, which was something that I think under the common ordinary rules of decency—

[COURT]: Yes.

[SALINAS'S COUNSEL]: —someone wouldn't do.

[COURT]: Right.

[SALINAS'S COUNSEL]: However, we did plan to Skiptrace locate, and serve them somewhere else.

I'm assuming they attended the—the funeral because based on his representations to me, they did. He said, don't—don't serve them at the funeral. I give you my word they will be here Tuesday morning. [6]

[COURT]: Okay.

[SALINAS'S COUNSEL]: I've been informed this morning that they're not going to show up, and I understand part of the argument that he's saying they're not my witnesses; I don't represent them; they're out of my control. But the problem is that if we're operating under these rules of honesty, honor, integrity, and when you give me your word, I'm assuming that somewhere down the road he had a conversation with them.

[COURT]: So the witnesses are not going to be available here this morning?

[SALINAS'S COUNSEL]: My understanding is and I think that [O'Caña's lead counsel] can address that, he's telling me that they will not appear this morning; and they were the first two people. I was going to call them out of order.

[COURT]: So you did not serve them at the funeral?

[SALINAS'S COUNSEL]: I did not serve them at the —at the funeral, and I want the Court to understand that there have been over 15 attempts made to serve this lady; specifically, Mrs. Veronica O'Caña. I have process servers that will testify to that. And the other day, the Court had suggested that [O'Caña's lead counsel] make arrangements with these people to have them come in. I understand—and again, with all due respect to Mr. O'Caña and Dr. O'Caña as the Mayor, I'm—I'm not going to sink to that threshold that—that low and get somebody served at a funeral, but I think that somebody could have followed them. Somebody could have figured out where these people were staying at. We had somebody on standby that was willing to do that, but I took him at his word. He said—and again, you can put me under oath if you want to, Judge. That was the exact conversation. I have a lot of admiration for [O'Caña's lead counsel].

*19

[O'CAÑA'S COUNSEL]: Your Honor, I have not spoken to either one of these witnesses, okay? And

so, I can't tell you that they told me that they would be available today. I was informed that they believed that they would be available today. I was informed this morning that—that they will not be here today. That's all. And—and I—when I spoke to [Salinas's lead counsel], he specifically told me—he said, we were not going to attempt any service during the funeral or during any of that stuff.

So they're out a day—or half—a day and an half—I mean, an hour and a half, you know. All I can tell you, Your Honor, as an Officer of the Court, I have not spoken to them. I was just simply informed originally that they would try to bring them today. I was informed this morning early in the morning that they would not be here. That's all I have, Your Honor. I have no control over these witnesses. I haven't talked to them. I don't know where they're at. I don't have any information with respect to them other than that.

[SALINAS'S COUNSEL]: Your Honor, may I—may I respond briefly? And again, I don't believe that [O'Caña's lead counsel] would do—I took him for his word when he said it, and I believe he meant it when he said that to me. Again, I'm not trying to say that he's playing tricks. However, I think the witnesses are, and we're going to get to a point where if they become available in their case in any defense, I'm asking that the Court not allow them to testify, number one.

And number two, that the Court consider giving itself its own instruction, considering the fact that in certain circumstances when witnesses are intentionally not making themselves available, that it's an issue of consciousness of guilt, number one. And number two, it's—it's similar to the issue of spoliation. That the Court take whatever they would have said in the—in the worst light for them and—and in the light most favorable for the Contestant. I can tell the Court that I—again, I don't believe that [O'Caña's lead counsel]—and I say—I use his first name because I consider him to be my friend. I believe that when he told me on Monday morning—

[COURT]: All right. But you're saying that if they are here for trial for [O'Caña's] case, you wish to be able to take them out of order and take them when they are here; is that correct?

[SALINAS'S COUNSEL]: That's correct. Either that or their—their testimony not—not be perpetuated. Because at this point, Judge, I don't know how else to handle it.

[COURT]: I'll let you take them out of order. If they show up, you can get them. I don't know—I'm very sorry this happened. I'm very disappointed this happened. Representation by counsel that they—that not to serve and that they'd have them here. Anyway, I see the situation. I know you did not make the representation—you say you did not make the representation.

***20** Assuming without deciding that O'Caña is correct and that the trial court must have found some agency relationship between O'Caña's campaign and Veronica O'Caña, the trial court's unchallenged factual findings and any deemed findings that we must apply given O'Caña's failure to request additional findings, *see TEX. R. CIV. P. 299; In re Estate of Miller*, 446 S.W.3d 445, 450 (Tex. App.—Tyler 2014, no pet.), support such a finding. The trial court heard evidence that O'Caña paid V.O. Consulting, Veronica O'Caña's entity, approximately \$ 31,200, representing 80% of the \$ 39,000 O'Caña raised for the mayoral election. Even setting aside the representations of counsel that concerned the trial court, it blinks reality that O'Caña could pay such a sum to Veronica O'Caña, his niece, and then be powerless to request her presence at trial four months later.

3. Summary

I would overrule O'Caña's fifth issue. Further, I conclude that the trial court's spoliation inference is an additional factor to consider in O'Caña's legal sufficiency challenge.

B. Legal Sufficiency

I address O'Caña's first issue, challenging the legal sufficiency of the trial court's findings that his campaign bribed voters and harvested mail-in ballots, in the order presented by O'Caña and the majority.

1. Standard of Review

We review a trial court's judgment in an election contest for an abuse of discretion. *Gonzalez v. Villarreal*, 251 S.W.3d 763, 774–75 (Tex. App.—Corpus Christi 2008, pet. dism'd). A trial court abuses its discretion if its decision lacks support “in the facts or circumstances of the case or when it acts in an arbitrary and unreasonable manner without references to guiding rules or principles of law.” *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011); see also *Gonzalez*, 251 S.W.3d at 774. However, a trial court does not abuse its discretion if some evidence reasonably supports its decision, even if the evidence is conflicting. *Butnar v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002).

In a legal sufficiency review of the evidence to support a finding that must be proved by clear and convincing evidence, we review all of the evidence in the light most favorable to the verdict—or factual finding in this case—to ascertain whether a reasonable factfinder could have formed a firm belief or conviction that the finding was true. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 866 (Tex. 2017). We assume that the factfinder resolved disputed facts in favor of the finding if a reasonable factfinder could do so. *Id.* We disregard all evidence that a reasonable factfinder could have disbelieved other than undisputed facts that do not support the finding. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002).

This case involves allegations of election fraud. The Texas Supreme Court has noted that in cases of fraud, “[i]t is not often that any kind of evidence but circumstantial evidence can be procured.” *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 622 (Tex. 2014) (quoting *Thompson v. Shannon*, 9 Tex. 536, 538 (1853)). Moreover, circumstantial evidence must be evaluated in light of all the known circumstances, not merely in isolation. *City of Keller v. Wilson*, 168 S.W.3d 802, 813–14 (Tex. 2005). If circumstantial evidence, when viewed in light of all the known circumstances, is equally consistent with either of two facts, then neither fact may be inferred. *Id.* at 813–14. But where the circumstantial evidence is not equally consistent with either of two facts, and the inference drawn by the factfinder is within the “zone of reasonable disagreement,” a reviewing court cannot substitute its judgment for that of the trier-of-fact. *Id.* at 822.

2. Applicable Law

“The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because illegal votes were counted.” **TEX. ELEC. CODE ANN. § 221.003(a)(1)** (West, Westlaw through 2017 1st C.S.). **Section 221.009(b) of the election code** provides, “If the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election, the tribunal may declare the election void without attempting to determine how individual voters voted.” *Id.* § 221.009(b) (West, Westlaw through 2017 1st C.S.).

***21** Generally, possession of an official ballot or carrier envelope belonging to another is a crime, and mailing another's ballot without following the proper procedures results in the ballot being illegal. *Id.* §§ 86.006(a)–(h),⁷ § 86.010(c)–(e),⁸ § 86.0051(b)⁹ (West, Westlaw through 2017 1st C.S.).

***22** O'Caña's legal sufficiency challenge is intertwined with his assertion that Korbel's opinions are unreliable. We review a trial court's rulings on the admissibility of evidence for an abuse of discretion, including rulings on the reliability of expert testimony. *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998). “Admission of expert testimony that does not meet the reliability requirement is an abuse of discretion.” *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006) (citation omitted). If a litigant has properly preserved a no-evidence challenge, “we independently consider whether the evidence at trial would enable reasonable and fair-minded jurors to reach the verdict.” *Whirlpool Corp.*, 298 S.W.3d at 638. This review “encompasses the entire record, including contrary evidence tending to show the expert opinion is incompetent or unreliable.” *Id.*; see also *City of Keller*, 168 S.W.3d at 810 (stating that no evidence exists if “the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact”).

O'Caña's argument also labors, at least in part, under a belief that Korbel's testimony must meet some or all of the *Robinson* factors. See *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995) (setting forth six factors courts “may consider” in determining whether expert testimony is admissible). But in *TXI Transportation Co. v. Hughes*, 306 S.W.3d 230, 235 (Tex. 2010), the Texas

Supreme Court addressed a similar notion involving accident reconstruction experts, writing that it has:

suggested several factors to consider when assessing the admissibility of expert testimony under Rule 702. We have emphasized, however, that these factors are non-exclusive, and that they do not fit every scenario. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998). They are particularly difficult to apply in vehicular accident cases involving accident reconstruction testimony. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 39 (Tex. 2007) (citing *Mendez*, 204 S.W.3d at 802 (Tex. 2006)); see also *Gammill*, 972 S.W.2d at 727. Nevertheless, the court, as gatekeeper, “must determine how the reliability of particular testimony is to be assessed.” *Gammill*, 972 S.W.2d at 726. Rather than focus entirely on the reliability of the underlying technique used to generate the challenged opinion, as in *Robinson*, we have found it appropriate in cases like this to analyze whether the expert’s opinion actually fits the facts of the case. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 904–05 (Tex. 2004). In other words, we determine whether there are any significant analytical gaps in the expert’s opinion that undermine its reliability. *Id.*

Hughes, 306 S.W.3d at 235.

3. Analysis

a. Bribed Voters

With regard to the bribed voters, the trial court found:

The direct testimony of fact witnesses was that the O’Caña campaign bribed at least 18 voters.

George Korbel, [Salinas’s] expert viewed the list of assisted voters finding the names of the bribed voters who testified to such. He found at least 48 voters who had most likely been bribed, comparing the closeness of times of voting and the names of those giving assistance to those who had testified as being bribed that day.

Mr. Korbel, as part of his election analysis, reviewed the testimony, the affidavits, the election materials, and his interviews to formulate his opinion on the vote bribery at issue in this cause. He was present during the entirety of the trial hearing all testimony.

The Court finds Mr. Korbel’s expert opinions to be relevant, reliable, and based on sufficient facts and data. The methodology Mr. Korbel used to form his opinions, including reviewing historical election data, conducting interviews, and statistical analysis, is testable and backed by sound methods used by election analysts in judicial and non-judicial inquiries. The Court finds that at least 48 voters were bribed to vote for Dr. Armando O’Caña during the June run-off election, but many more voters were likely bribed.

*23 (factual findings 33–36). The majority sustains O’Caña’s legal sufficiency challenge to Korbel’s testimony that forty-eight voters assisted by Guadalupe O’Caña, Laura Rodriguez, and Veronica O’Caña were very likely bribed by concluding that Korbel’s testimony is conclusory. Specifically, the majority writes:

... Korbel’s testimony regarding the “very likely” quantity of additional bribed votes does not meet the exacting standard of “clear and convincing.” Korbel stated that 48 early voters cast their ballots around the same time as the five voters who testified they were paid, and were assisted by the same people as those five voters. Korbel opined that all 48 voters were also paid; but he based that opinion on an “assumption” that “if you pay one ... you’re going to pay everybody and that’s the way the world works.” He did not explain the underlying basis for this assumption, and though Korbel is undoubtedly an expert in election analyses concerning racially polarized voting, there is nothing in his background that would indicate an expertise in vote bribery. His testimony that “if you pay one ... you’re going to pay everybody” is unsupported by any factual basis or underlying reasoning. This conclusory testimony is not probative.

Slip Mem. Op., at 16 (citation omitted).

I respectfully disagree with this analysis. In my assessment, the majority errs in two ways by dismissing Korbel’s “assumption” that Guadalupe O’Caña, Laura Rodriguez, and Veronica O’Caña very likely bribed all forty-eight voters who cast their ballots in close temporal proximity to the votes cast with their assistance by Deckard, Durr, Gomez, and Navarro. First, the applicable standard of review does not require that every opinion, assumption, or inference meet a “clear and convincing” standard. Instead, we are tasked with reviewing *all of the evidence* in the light

most favorable to the factual finding to ascertain whether a reasonable factfinder could have formed a firm belief or conviction that the finding was true. *See Horizon Health Corp.*, 520 S.W.3d at 866. Second, the majority seemingly uses its belief that Korbel is unqualified to provide an expert opinion on “vote bribery” to discount Korbel’s “assumption.”¹⁰ Linking the temporal proximity of ballots cast with the assistance of campaign workers accused of bribing strangers with those of other ballots cast with the assistance of the same campaign workers is not the stuff of peer-reviewed publications. *Cf. Robinson*, 923 S.W.2d at 557. Instead, I believe that Korbel, as an expert in voting rights and election analysis, is akin to an accident reconstruction expert in that rather than focusing entirely on the reliability of the underlying technique used to generate Korbel's opinion, as in *Robinson*, it is appropriate in cases like this to analyze whether Korbel's opinion actually fits the facts of the case. *See Hughes*, 306 S.W.3d at 235. By not recognizing that Korbel's expertise in election analysis fits the facts of this case, the majority probes for a type of “factual basis or underlying reasoning” that the law governing the legal sufficiency of expert testimony does not demand from him. *See Horizon Health Corp.*, 520 S.W.3d at 866.

*24 Instead, I conclude that Korbel's opinion actually fits the facts of this case and there are no analytical gaps in it. *See id.* Korbel's “assumption” that Guadalupe O'Caña, Laura Rodriguez, and Veronica O'Caña very likely bribed those voters who they assisted in close temporal proximity to assisting and bribing Deckard, Durr, Gomez, and Navarro is reasonable. Indeed, most factfinders would find it implausible that these O'Caña campaign workers solemnly refrained from such conduct with all other voters. *See City of Keller*, 168 S.W.3d at 813–14 (explaining the equal inference rule). There is no indication that the bribe offers extended to those O'Caña voters who testified was limited or clandestine. To the contrary, O'Caña campaign workers invariably bribed voters in groups and asked if these voters knew others who were willing to sell their vote. Therefore, I conclude that there was legally sufficient evidence that forty-eight individuals were bribed into voting for O'Caña.

b. Harvested Mail-in Ballots

As relevant to the harvested mail-in ballots, the trial court found:

On two occasions witnesses testified of seeing two particular O'Caña workers with many mail in ballots each. One witness testifying to a stack of ballots six inches high and another a “large bag full.”

....

I find clear and convincing evidence that the number of illegally handled mail in ballots by members of the O'Caña campaign is in excess of 150 although it is impossible to know the exact number.

(factual findings 41 and 55). The majority discounts Ochoa's testimony that she saw Lara with 200 mail-in ballots as circumstantial and a guess.¹¹ I believe that the majority misapprehends the record.

Before trial, Ochoa executed an affidavit that provides:

I[,] Carmen Ochoa[,] arrived at the front office to pay my rent. The office lady was tied up talking to a short lady with a big build. They were talking about the run off elections. I then saw the office lady give a hand full of mail in ballots to that short chubby lady. It looked wired [sic] since she did not live there and that there were way to [sic] many ballots. After I looked at the pictures[,] I picked out Esmer Lara out. [sic] If I was to estimate how many ballots were taken[,] I'd say 20 to 40.

At trial, Salinas's counsel asked and Ochoa answered:

Q. And a little while ago, Ms. Ochoa, you were using your hands to describe—for the record, nobody has seen what you're testifying to so can you tell us, can you show us with your hands what you recall seeing as far as the size, using your hands. Can you hold that over real quick?

A. The ballots like this.

Q. Can you hold your hands there right now? How many inches more or less in your opinion would that be?

A. I do not understand about that.

Q. Okay.

Q. Anybody have a measuring tape?

Q. Would it be fair to say—do you know what a foot is?

A. Yes, more or less.

A. More.

A. More.

Q. Okay. So is it your opinion that what you saw was more or less a stack of ballots that measured up to about a foot?

A. I do not understand about that but I figure 200, around 200, more or less.

Q. 200 ballots?

A. Well, that's what I see, that's what I saw.

On cross examination, O'Caña's counsel asked and Ochoa answered:

Q. So, when you testified earlier that you saw—the only thing you saw was Ms. Lara walking out of the office with a bunch of ballots in her hand, that was not what you originally swore to, right?

A. Well, I say what I spoke. I said it.

Q. And when you—and when you testified that there was 200 ballots in the possession of Ms. Lara, *that's not what you swore to before*, right?

A. Well, what I say is like this, I only kind of *guess*.

Q. Well, you, on your own volunteered, did you not, that there were 200 ballots, right?

*25 A. Well, I did—

[SALINAS'S COUNSEL]: Your Honor—

A. —it is—

[SALINAS'S COUNSEL]: —and for the record, she's using her hands. Since we don't have a record of it, she's—

[O'CAÑA COUNSEL]: Your Honor, that doesn't matter what he wants. Is there an objection? Is there an objection?

[COURT]: Wait a minute.

[SALINAS'S COUNSEL]: What I'm saying is that it's nonverbal communication that's important for the record.

[O'CAÑA COUNSEL]: Your Honor, it doesn't matter what he says, it's not—

[SALINAS'S COUNSEL]: I'm not objecting to what he's doing—

[O'CAÑA COUNSEL]: Well, what is he doing? He's interrupting my cross-examination.

[COURT]: I have—I have observed how she held her hands.

(Emphasis added).

Under the applicable standard of review, we are to assume that the trial court resolved the discrepancy between Ochoa's affidavit averment regarding a range of twenty to forty and live, in-court testimony regarding approximately 200 mail-in ballots in favor of its judgment if a reasonable factfinder could do so. *See Horizon Health Corp.*, 520 S.W.3d at 866. Even in the cold record, Ochoa ascribes her “guess” to the “20 to 40” range that she stated in her affidavit. Accordingly, on Ochoa's testimony alone the trial court may have reasonably determined that Lara was holding 200 mail-in ballots.

Next, the majority concludes Korbel's opinion that as many as 303 mail-in ballots were harvested by the O'Caña campaign is legally insufficient because it is founded on layers of inferences and assumptions. Specifically, the majority writes:

In particular, [Korbel] seems to assume that all of the mail-in voters in Mission are “poor” and therefore could not afford a \$ 50 roll of

stamps. This assumption was critical to Korbel's inference that some or all of the envelopes bearing the folded-flag roll stamp were subject to illegal harvesting. Without this assumption, there would be no reason to believe that an envelope bearing a particular type of stamp is any more or less likely to have been cast due to illegal harvesting.

Slip Mem. Op., at 17. The majority errs by focusing on Korbel's comments regarding the area's low-income population.

Korbel's opinion is based upon the testimony of several witnesses. Gutierrez testified that Lara took his carrier envelope that he had signed before he had the opportunity to mark his ballot. When Gutierrez's carrier envelope arrived at the election administrator's office, there was no indication that he had received assistance in voting from anyone, including Lara. Further, Korbel identified Gutierrez's ballot, admitted at trial, as being among those that were mailed using the folded flag stamp from a \$ 50 roll. These are two points that O'Caña does not assail and the majority does not address. Additionally, Hernandez and Lara also solicited and then secretly assisted the following elderly or disabled voters, all of whom testified, by collecting their mail-in ballots for the runoff election: Victoria Salinas, Emma Barrera, Guadalupe Barrera, Rogelio Corpus, Leticia Cooley, Maria Canales, Emma Alaniz, Guadalupe Perez, and Margarita Ramirez.¹² These assisted voters did not mail their ballots or place a stamp on the carrier envelopes. Additionally, their carrier envelopes, which were admitted at trial, did not indicate Hernandez's or Lara's assistance, and their carrier envelopes were all stamped with a folded flag stamp that came from a \$ 50 roll.

*²⁶ I also note that O'Caña admitted to purchasing a roll of stamps during the relevant period. He, however, denied providing these stamps to campaign workers. As with all other testimony, it was the trial court's prerogative to assess O'Caña's credibility. See *City of Keller*, 168 S.W.3d at 819–20.

The majority's legal sufficiency analysis finishes by tying Korbel to a strawman with speculation—an argument

O'Caña never made. The majority posits that Korbel's opinion flows from a false dichotomy, writing:

Korbel *seems* to have entertained only two possibilities for why that may have occurred: (1) each of the 303 voters individually and independently purchased a \$ 50 roll of identical stamps,^[13] or (2) rampant fraud occurred.

Slip Mem. Op., at 19 (emphasis added). Korbel never opined that 303 voters individually and independently purchased a \$ 50 roll of identical stamps. Instead, that appears to be the majority's assumption for how carrier envelopes may have been coupled with a folded flag stamp. *See id.* But, the possibility of perfectly legal mail-in ballots does not explain how 303 carrier envelopes were mailed using the identical stamp. Rather than speculating about how perfectly legal mail-in ballots may have been returned to the election administrator, as the majority does, I have reviewed the presence of these 303 carrier envelope in light of the testimony that the O'Caña campaign rented in cash a Sprinter van with tinted windows from an individual in a parking lot. And that the O'Caña campaign used this van to ferry voters to the polls, instruct them to ask the poll workers for assistance and then preceded to "assist" these voters in the privacy of the van, and then paid them for their votes afterwards.

Lastly, the majority contends that "the dearth of direct evidence" necessitates that we look to "[t]he apparently uncontested fact that a plurality of the illegally harvested ballots proven at trial were actually cast for Salinas" in conducting our legal sufficiency review. Again, the majority is making O'Caña's argument for him and turning a blind eye toward of wealth of evidence supporting the trial court's findings.

The majority's implicit assumption that 357 voters, including those mentioned above, each individually and independently purchased a \$ 50 roll of identical stamps is implausible. *See id.* at 802, 813–14 (explaining the equal inference rule). And, it is immaterial to our legal sufficiency analysis that there was some evidence that the Salinas campaign may have also engaged in improper campaign conduct. *See In re J.F.C.*, 96 S.W.3d at 266.

4. Summary

After considering the entire record and the spoliation inference that the trial court made within its discretion, I conclude that there is legally sufficient evidence to support the trial court's finding, by clear and convincing evidence, that the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of the election. *See TEX. ELEC. CODE ANN. § 221.012(b)*. Further, the trial court could have formed a firm belief or conviction in this finding based only on the evidence adduced at trial. *See In re J.F.C.*, 96 S.W.3d at 266. Therefore, I conclude that the trial court did not abuse its discretion in finding that it could not determine the true outcome of the election and in rendering a judgment voiding the election results. *See McCurry*, 259 S.W.3d at 372. I would overrule O'Caña's first issue.

III. CONCLUSION

*27 As with the majority, I am confident that the criminal justice system is available to prosecute any potential conduct that violates the Texas Penal Code, Texas Election Code, and applicable federal law. But the criminal justice system's primary goal is not to remedy the effect of illegal votes. Unlike the majority, I do not believe that the civil justice system is powerless to remedy the tainted mayoral runoff election that is the subject of this appeal. The legislature has prescribed a remedy by allowing contestants such as Salinas to petition a trial court and present evidence of alleged improprieties. The heightened evidentiary standard of "clear and convincing evidence" mandated by the legislature rests upon a body of common law rules that recognizes allegations of fraud

are generally proven with circumstantial evidence,¹⁴ requires a review of the totality of the evidence and an avoidance of isolating evidence,¹⁵ and accords deference to assumptions and inferences that are reasonable.¹⁶ *See Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) (providing that a statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it). These common law rules also render the notion that Salinas may have benefited from irregularities, a point emphasized by the majority, as mostly irrelevant to our legal sufficiency review. I respectfully submit that the majority fails to appreciate and apply these common law rules.¹⁷ The evidence in this case, as reviewed under these common law rules, meets the heightened evidentiary standard of "clear and convincing evidence."

In closing, the majority puts forward that its holding safeguards a voter's right to have his or her lawful vote counted. I believe that it does not. By reversing the trial court's judgment, the majority allows lawful votes to be diluted and may dissuade voters from participating in the electoral process.

For all of these reasons, I would modify the trial court's judgment to delete the provision ordering a new runoff election within sixty days of November 6, 2018, the judgment's date, because that date has passed, affirm the judgment as modified, and remand with instructions to set a new runoff election date. Because the majority does not do so, I respectfully dissent.

All Citations

Not Reported in S.W. Rptr., 2019 WL 1414021

Footnotes

- ¹ The remaining general election votes went to Jaime Gutierrez.
- ² O'Caña filed a pre-trial motion to exclude Korbel's testimony pursuant to the *Daubert/Robinson* standard for expert testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (holding that when the subject of expert testimony is scientific knowledge, the basis of the testimony must be grounded in accepted scientific methods and procedures); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995) ("Scientific evidence which is not grounded in the methods and procedures of science is no more than subjective belief or unsupported speculation."). After a hearing, the trial court denied the motion and admitted Korbel's testimony.
- ³ Korbel testified, over O'Caña's objection, that this type of stamp is available from the post office in either a book of twenty, which costs \$10, or a roll of one hundred, which costs \$50. He stated that the stamps that come in a roll have perforations only on the left and right sides, whereas the stamps that come in a book have perforations on the top or bottom or both

in addition to the sides. The folded-flag stamps he observed on the carrier envelopes for voters who alleged harvesting activities had perforations only on the left and right sides. Korbel stated he works part time representing very poor and disabled people and he testified, over objection, that "no poor person would buy a roll of stamps for \$ 50."

4 A voter is eligible to receive assistance at a polling place "if the voter cannot prepare the ballot because of: (1) a physical disability that renders the voter unable to write or see; or (2) an inability to read the language in which the ballot is written." *TEX. ELEC. CODE ANN. § 64.031* (West, Westlaw through 2017 1st C.S.). If assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted. *Id.* § 64.037 (West, Westlaw through 2017 1st C.S.).

5 Forms of polling place assistance authorized by the election code include: (1) reading the ballot to the voter; (2) directing the voter to read the ballot; (3) marking the voter's ballot; and (4) directing the voter to mark the ballot. *Id.* § 64.031 (West, Westlaw through 2017 1st C.S.).

6 In general, section 86.006 is not applicable to a person who is: (1) related to the voter within the second degree by affinity or the third degree by consanguinity; (2) physically living in the same dwelling as the voter; (3) an early voting clerk or a deputy early voting clerk; (4) an employee of the United States Postal Service working in the normal course of the employee's authorized duties; or (5) a common or contract carrier working in the normal course of the carrier's authorized duties. *Id.* § 86.006(f)(1)–(3), (f)(5), (f)(6) (West, Westlaw through 2017 1st C.S.).

7 The parties appear to agree that a vote obtained by bribery is not legally countable, though they cite no authority explicitly stating that proposition. We assume for purposes of this analysis that a vote obtained by bribery is not legally countable.

8 There is no evidence in the record that anyone other than O'Caña himself deleted correspondence.

9 Salinas's proposed conclusions of law regarding spoliation included: "While the evidence at trial was sufficient to support the legal conclusions in this case, in addition to the evidence, the Court adopts an adverse inference against the Contestee because Contestee spoliated evidence." The trial court did not adopt this conclusion, indicating that it did not necessarily believe the evidence was sufficient to support the judgment without the spoliation inference.

10 O'Caña argues by his third issue that there was no evidence of the results of the "final canvass" of the election, and that this deficiency renders the judgment improper under the election code. See *id.* § 221.003(a)(1) (limiting the scope of the trial court's inquiry in an election contest to ascertaining whether the "outcome of the contested election, as shown by the final canvass, is not the true outcome"); but see *Slusher v. Streater*, 896 S.W.2d 239, 242 (Tex. App.—Houston [1st Dist.] 1995, no writ) (finding no abuse of discretion where trial court based its ruling on results according to unofficial recount rather than official final canvass).

In response, Salinas acknowledges that there was no evidence of the final canvass results but asserts that the trial court could, and this Court may, take judicial notice of those results as they appear on the Mission city website. See CITY OF MISSION, CANVASS OF ELECTION RETURNS, JUNE 9, 2018, <http://missiontx.us/wp-content/uploads/2018/06/Canvass-Report.pdf> (last visited March 29, 2019); see also *State ex rel. Lukovich v. Johnston*, 228 S.W.2d 327, 328 (Tex. Civ. App.—Galveston 1950, writ dism'd) ("It seems to be the settled law in this state that a trial court is required to take judicial notice of the fact that a municipal election was held in the city in which the court is situated and the general result of the election."). Salinas further argues that, even if the trial court erred, that error was harmless because the final canvass results are identical to the unofficial results as testified to by Korbel. See *TEX. R. APP. P. 44.1(a)*.

Assuming but not deciding that evidence of the final canvass results was required by the statute, we conclude that such requirement was satisfied in this case. Although Korbel initially stated that he obtained "unofficial" results from the Hidalgo County Elections Department, he later stated that his data came from "[t]he canvas[s] of election returns" and that the data represented the "final" results of the election. Further, Korbel testified that he and other election analysts use unofficial results "[b]ecause they're generally available" and they are "never" wrong "more than one vote one direction or the other." The trial court could have reasonably inferred from this testimony that the results used by Korbel in his analysis were in fact the results of the election "as shown by the final canvass." See *TEX. ELEC. CODE ANN. § 221.003(a)(1)*. O'Caña's third issue is overruled.

11 Contrary to the trial court's finding number 54, Korbel did not testify that this was the "likely" range of harvested ballots; he stated that 27 was a minimum and 303 was a maximum.

12 As stated above, there was direct testimony of 18 harvested ballots. According to the trial testimony, six of the harvested ballots were Salinas votes, two were O'Caña votes, and the remainder were unidentified. The dissent argues that "it is immaterial to our legal sufficiency analysis that there was some evidence that the Salinas campaign may have also engaged in improper campaign conduct." It is true that, when the number of illegal votes is equal to or greater than the number necessary to change the outcome, the trial court is permitted to invalidate the election results without determining how individual voters voted. *Id.* § 221.009(b) (West, Westlaw through 2017 1st C.S.). But here, due to the dearth of direct evidence of illegal votes relative to the victory margin, Salinas's argument that the number of illegal votes exceeded the

threshold in this case relies on his allegation of a "conspiracy" by O'Caña campaign workers to bribe voters and harvest ballots. The apparently uncontested fact that a plurality of the illegally harvested ballots proven at trial were actually cast for Salinas is surely relevant to whether such a "conspiracy" existed.

13 As noted, Lara testified at trial that she was working for Salinas during the run-off election.

14 The dissent suggests that Ochoa described only her first assessment of the number of ballots Lara was carrying—"20 to 40"—as a "guess." From our reading of the record of Ochoa's translated testimony, we believe Ochoa also described her trial estimate of "around 200" as a "guess."

15 The dissent is correct that we must presume the legislature enacted the "clear and convincing" standard for election contests with complete knowledge of existing law, which includes the common law tenets that ordinary fraud is often proved with circumstantial evidence only, that we review the totality of the evidence and avoid isolating evidence, and that we defer to reasonable assumptions and inferences. See *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 622 (Tex. 2014); *City of Keller v. Wilson*, 168 S.W.3d 802, 813–14 (Tex. 2005); *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). The dissent seems to additionally suggest that, because the legislature was aware of these common law precepts when it enacted the "clear and convincing" standard, it must have intended for those tenets to apply equally to election contests. But *Castillo*, *City of Keller*, and *Acker* were not election contests. And despite being aware of the existing law, the legislature nevertheless chose to require a heightened standard for election contests, thereby reflecting its unmistakable intent that election contests be treated differently. In any event, even assuming the common law rules apply equally to election contests, we are under no obligation to defer to assumptions and inferences which are unreasonable in light of the entire record.

1 The parties concede and the majority acknowledges that Salinas received one improper vote, moving O'Caña's margin of victory from 157 to 158.

2 Elizabeth "Liz" Hernandez and Lara also solicited, and then secretly assisted the following elderly or disabled voters, all of whom testified, by collecting their mail-in ballots for the runoff election: Victoria Salinas, Emma Barrera, Guadalupe Barrera, Rogelio Corpus, Leticia Cooley, Maria Canales, Emma Alaniz, Guadalupe Perez, and Margarita Ramirez.

3 Lara testified that she worked for O'Caña's campaign during the general election but secretly switched allegiance and worked for Salinas's campaign during the runoff election. However, after O'Caña's runoff victory, Liz Rodriguez posted a Facebook message stating, "Thank U Esmer Lara AND Veronica O'Caña FOR LETTING [sic] BE A PART OF UR [sic] TEAM YES WE DID IT!!!!" Lara responded, "My heart was full with u all and my prayers [sic] to. I new [sic] Lisa wouldn't let me down. I can always count on u. Now I have to celebrate with you all."

4 I generally agree with the majority's holding that rejects Salinas's contention that O'Caña waived all of his legal sufficiency challenge by not identifying specific factual findings. See Slip Mem. Op. 10. I would not summarily overrule O'Caña's legal sufficiency challenge because I am able to link, for the most part, O'Caña's legal sufficiency arguments to the specific findings made by the trial court. However, unlike the majority, I will hold O'Caña to the rule that when a trial court issues fact findings and inadvertently omits an essential element of a ground of recovery, the presumption of validity supplies by implication any omitted elements that are supported by evidence. See *TEX. R. CIV. P. 299; In re Estate of Miller*, 446 S.W.3d 445, 450 (Tex. App.—Tyler 2014, no pet.).

5 I note that Deckard's affidavit was executed June 19, 2018, thirteen days after the June 6, 2018 runoff.

6 At this point, I note two things. First, O'Caña's counsel did not deny the representations made by Salinas's counsel regarding arranging for Veronica to appear at trial without the need to serve her with a subpoena at her uncle's funeral. I conclude these representations—made by officers of the court in the heat of an expedited trial—constitute some evidence for the trial court to have found that O'Caña or his attorney controlled Veronica to the extent that they had the ability to compel her presence at trial. Second, the majority places much stock in a process server's testimony. It errs by inverting the deemed finding rule and not fully appreciating the trial's prerogative regarding the credibility of witnesses.

7 Section 86.006(a)–(h) of the election code provides:

(a) A marked ballot voted under this chapter must be returned to the early voting clerk in the official carrier envelope.

The carrier envelope may be delivered in another envelope and must be transported and delivered only by:

(1) mail;

(2) common or contract carrier; or

(3) subject to Subsection (a-1), in-person delivery by the voter who voted the ballot.

(a-1) The voter may deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day. A voter who delivers a marked ballot in person must present an acceptable form of identification described by Section 63.0101.

(b) Except as provided by Subsection (c), a carrier envelope may not be returned in an envelope or package containing another carrier envelope.

(c) The carrier envelopes of persons who are registered to vote at the same address may be returned in the same envelope or package.

(d) Each carrier envelope that is delivered by a common or contract carrier must be accompanied by an individual delivery receipt for that particular carrier envelope that indicates the name and residence address of the individual who actually delivered the envelope to the carrier and the date, hour, and address at which the carrier envelope was received by the carrier. A delivery of carrier envelopes is prohibited by a common or contract carrier if the delivery originates from the address of:

- (1) an office of a political party or a candidate in the election;
- (2) a candidate in the election unless the address is the residence of the early voter;
- (3) a specific-purpose or general-purpose political committee involved in the election; or
- (4) an entity that requested that the election be held, unless the delivery is a forwarding to the early voting clerk.

(e) Carrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk. The secretary of state shall prescribe appropriate procedures to implement this subsection and to provide accountability for the delivery of the carrier envelopes from the voting place to the early voting clerk.

(f) A person commits an offense if the person knowingly possesses an official ballot or official carrier envelope provided under this code to another. Unless the person possessed the ballot or carrier envelope with intent to defraud the voter or the election authority, this subsection does not apply to a person who, on the date of the offense, was:

- (1) related to the voter within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code;
- (2) physically living in the same dwelling as the voter;
- (3) an early voting clerk or a deputy early voting clerk;
- (4) a person who possesses a ballot or carrier envelope solely for the purpose of lawfully assisting a voter who was eligible for assistance under [Section 86.010](#) and complied fully with:
 - (A) [Section 86.010](#); and
 - (B) [Section 86.0051](#), if assistance was provided in order to deposit the envelope in the mail or with a common or contract carrier;
- (5) an employee of the United States Postal Service working in the normal course of the employee's authorized duties; or
- (6) a common or contract carrier working in the normal course of the carrier's authorized duties if the official ballot is sealed in an official carrier envelope that is accompanied by an individual delivery receipt for that particular carrier envelope.

(g) An offense under Subsection (f) is a Class A misdemeanor unless the defendant possessed the ballot or carrier envelope without the request of the voter, in which case it is a felony of the third degree. If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

(g-1) An offense under Subsection (g) is increased to the next higher category of offense if it is shown on the trial of an offense under this section that:

- (1) the defendant was previously convicted of an offense under this code;
- (2) the offense involved an individual 65 years of age or older; or
- (3) the defendant committed another offense under this section in the same election.

(h) A ballot returned in violation of this section may not be counted. If the early voting clerk determines that the ballot was returned in violation of this section, the clerk shall make a notation on the carrier envelope and treat it as a ballot not timely returned in accordance with Section 86.011(c). If the ballot is returned before the end of the period for early voting by personal appearance, the early voting clerk shall promptly mail or otherwise deliver to the voter a written notice informing the voter that:

- (1) the voter's ballot will not be counted because of a violation of this code; and
- (2) the voter may vote if otherwise eligible at an early voting polling place or the election day precinct polling place on presentation of the notice.

[TEX. ELEC. CODE ANN. § 86.006\(a\)–\(h\)](#) (West, Westlaw through 2017 1st C.S.).

8 Section 86.010(c)–(e) of the election code provides:

- (c) The person assisting the voter must sign a written oath prescribed by Section 64.034 that is part of the certificate on the official carrier envelope.
- (d) If a voter is assisted in violation of this section, the voter's ballot may not be counted.
- (e) A person who assists a voter to prepare a ballot to be voted by mail shall enter the person's signature, printed name, and residence address on the official carrier envelope of the voter.

Id. § 86.010(c)–(e) (West, Westlaw through 2017 1st C.S.).

9 **Section 86.0051(b) of the election code** provides:

A person other than the voter who assists a voter by depositing the carrier envelope in the mail or with a common or contract carrier or who obtains the carrier envelope for that purpose must provide the person's signature, printed name, and residence address on the reverse side of the envelope.

Id. § 86.0051(b) (West, Westlaw through 2017 1st C.S.).

10 I note that in discounting Korbel's "assumption" the majority also does not address O'Caña's second issue, in which he contends that the trial court abused its discretion in admitting Korbel's testimony.

11 The majority notes that Lara testified she "switched" to Salinas's camp during the runoff election. The trial judge, as the factfinder in this case, was entitled to believe all, some, or none of Lara's testimony if a reasonable juror could. See *City of Keller v. Wilson*, 168 S.W.3d 802, 819–20 (Tex. 2005).

12 For brevity, I will not recount each of these voter's in-court testimony.

13 I note that Korbel did not testify that "no Mission voters are capable of affording a \$ 50 roll of stamps," as the majority writes. Instead, his opinion was that those Mission voters who voted by mail tended not to purchase stamps in \$ 50 increments.

14 *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 622 (Tex. 2014) (quoting *Thompson v. Shannon*, 9 Tex. 536, 538 (1853)).

15 *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 866 (Tex. 2017).

16 *City of Keller v. Wilson*, 168 S.W.3d 802, 813–14 (Tex. 2005).

17 The majority faults my reliance on these common law rules, noting that they are not derived from election contest cases. Instead, the majority posits that the legislature's requirement for a heightened standard in election contests reflects "its unmistakable intent that election contests be treated differently." See Slip Mem. Op., at 21, n.16. If the majority believed this to be true in all respects, I would expect it to limit its cited authority to only election law cases. It does not. More importantly, I do not believe the legislature's prescription for a heightened standard is in any way inconsistent with the long-standing common law rules I cite in this dissent. Cf. *In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012) (applying the existing common-law *Holley* factors in relation to statutory requirement that a best-interest finding in termination cases be established by clear and convincing evidence). Neither do I believe that the pertinent statutory framework implicitly contains such a restriction. See *Lee v. City of Houston*, 807 S.W.2d 290, 294–95 (Tex. 1991) ("A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.").



THE THIRTEENTH COURT OF APPEALS

13-18-00563-CV

Armando O'Caña
v.
Norberto 'Beto' Salinas

On appeal from the
93rd District Court of Hidalgo County, Texas
Trial Cause No. C-2637-18-B

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes the judgment of the trial court should be reversed and rendered. The Court orders the judgment of the trial court REVERSED and RENDERED. Costs of the appeal are adjudged against appellee.

We further order this decision certified below for observance.

March 29, 2019

Tab E

2019 WL 1442977

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION IN THE
PERMANENT LAW REPORTS. UNTIL RELEASED,
IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas, Corpus Christi-Edinburg.

Armando O'Caña

v.

Norberto 'Beto' Salinas

Re: Cause No. 13-18-00563-CV

|

April 2, 2019

Tr.Ct.No. C-2637-18-B

JUSTICES GINA M. BENAVIDES NORA L.
LONGORIA LETICIA HINOJOSA RODOLFO
"RUDY" DELGADO GREGORY T. PERKES

Opinion

CHIEF JUSTICE **DORI CONTRERAS**

Dear Counsel:

Enclosed please find a corrected dissenting opinion. A correction has been made to page 2, first full paragraph, third sentence.

The word "trial" has been replaced with "election". The sentence is corrected to read as follows: Instead, the trial court found that it could not determine the true outcome of the election and ordered a new election.

Very truly yours,

Dorian E. Ramirez, Clerk

All Citations

--- S.W.3d ----, 2019 WL 1442977

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TAB E

Tab F

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 7. Early Voting (Refs & Annos)
Subtitle A. Early Voting
Chapter 86. Conduct of Voting by Mail (Refs & Annos)

V.T.C.A., Election Code § 86.005

§ 86.005. Marking and Sealing Ballot

Effective: January 1, 2004

Currentness

- (a) A voter must mark a ballot voted by mail in accordance with the instructions on the ballot envelope.
- (b) A voter may mark the ballot at any time after receiving it.
- (c) After marking the ballot, the voter must place it in the official ballot envelope and then seal the ballot envelope, place the ballot envelope in the official carrier envelope and then seal the carrier envelope, and sign the certificate on the carrier envelope.
- (d) Failure to use the official ballot envelope does not affect the validity of the ballot.
- (e) After the carrier envelope is sealed by the voter, it may not be opened except as provided by Chapter 87.
- (f) Expired.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by [Acts 1991, 72nd Leg., ch. 203, § 2.12](#); [Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991](#); [Acts 2003, 78th Leg., ch. 1315, § 44](#), eff. Jan. 1, 2004.

[Notes of Decisions \(7\)](#)

V. T. C. A., Election Code § 86.005, TX ELECTION § 86.005

Current through Chapters effective immediately through Chapter 5 of the 2019 Regular Session of the 86th Legislature

Tab G

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated

Election Code (Refs & Annos)

Title 7. Early Voting (Refs & Annos)

Subtitle A. Early Voting

Chapter 86. Conduct of Voting by Mail (Refs & Annos)

V.T.C.A., Election Code § 86.0051

§ 86.0051. Unlawful Carrier Envelope Action by Person Other than Voter

Effective: December 1, 2017

Currentness

(a) A person commits an offense if the person acts as a witness for a voter in signing the certificate on the carrier envelope and knowingly fails to comply with [Section 1.011](#).

(b) A person other than the voter who assists a voter by depositing the carrier envelope in the mail or with a common or contract carrier or who obtains the carrier envelope for that purpose must provide the person's signature, printed name, and residence address on the reverse side of the envelope.

(c) A person commits an offense if the person knowingly violates Subsection (b). It is not a defense to an offense under this subsection that the voter voluntarily gave another person possession of the voter's carrier envelope.

(d) An offense under this section is a Class A misdemeanor, unless it is shown on the trial of an offense under this section that the person committed an offense under [Section 64.036](#) for providing unlawful assistance to the same voter in connection with the same ballot, in which event the offense is a state jail felony.

(e) This section does not apply if the person is related to the voter within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code, or was physically living in the same dwelling as the voter at the time of the event.

(f) If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

Credits

Added by [Acts 2003, 78th Leg., ch. 393, § 13, eff. Sept. 1, 2003](#). Amended by [Acts 2017, 85th Leg., 1st C.S., ch. 1 \(S.B. 5\), §§ 10, 11, eff. Dec. 1, 2017](#).

V. T. C. A., Election Code § 86.0051, TX ELECTION § 86.0051

Current through Chapters effective immediately through Chapter 5 of the 2019 Regular Session of the 86th Legislature

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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

[Vernon's Texas Statutes and Codes Annotated](#)

[Election Code \(Refs & Annos\)](#)

[Title 7. Early Voting \(Refs & Annos\)](#)

[Subtitle A. Early Voting](#)

[Chapter 86. Conduct of Voting by Mail \(Refs & Annos\)](#)

V.T.C.A., Election Code § 86.006

§ 86.006. Method of Returning Marked Ballot

Effective: December 1, 2017

[Currentness](#)

(a) A marked ballot voted under this chapter must be returned to the early voting clerk in the official carrier envelope. The carrier envelope may be delivered in another envelope and must be transported and delivered only by:

(1) mail;

(2) common or contract carrier; or

(3) subject to Subsection (a-1), in-person delivery by the voter who voted the ballot.

(a-1) The voter may deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day. A voter who delivers a marked ballot in person must present an acceptable form of identification described by [Section 63.0101](#).

(b) Except as provided by Subsection (c), a carrier envelope may not be returned in an envelope or package containing another carrier envelope.

(c) The carrier envelopes of persons who are registered to vote at the same address may be returned in the same envelope or package.

(d) Each carrier envelope that is delivered by a common or contract carrier must be accompanied by an individual delivery receipt for that particular carrier envelope that indicates the name and residence address of the individual who actually delivered the envelope to the carrier and the date, hour, and address at which the carrier envelope was received by the carrier. A delivery of carrier envelopes is prohibited by a common or contract carrier if the delivery originates from the address of:

(1) an office of a political party or a candidate in the election;

TAB H

- (2) a candidate in the election unless the address is the residence of the early voter;
- (3) a specific-purpose or general-purpose political committee involved in the election; or
- (4) an entity that requested that the election be held, unless the delivery is a forwarding to the early voting clerk.

(e) Carrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk. The secretary of state shall prescribe appropriate procedures to implement this subsection and to provide accountability for the delivery of the carrier envelopes from the voting place to the early voting clerk.

(f) A person commits an offense if the person knowingly possesses an official ballot or official carrier envelope provided under this code to another. Unless the person possessed the ballot or carrier envelope with intent to defraud the voter or the election authority, this subsection does not apply to a person who, on the date of the offense, was:

- (1) related to the voter within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code;¹
- (2) physically living in the same dwelling as the voter;
- (3) an early voting clerk or a deputy early voting clerk;
- (4) a person who possesses a ballot or carrier envelope solely for the purpose of lawfully assisting a voter who was eligible for assistance under [Section 86.010](#) and complied fully with:
 - (A) [Section 86.010](#); and
 - (B) [Section 86.0051](#), if assistance was provided in order to deposit the envelope in the mail or with a common or contract carrier;
- (5) an employee of the United States Postal Service working in the normal course of the employee's authorized duties; or
- (6) a common or contract carrier working in the normal course of the carrier's authorized duties if the official ballot is sealed in an official carrier envelope that is accompanied by an individual delivery receipt for that particular carrier envelope.

(g) An offense under Subsection (f) is a Class A misdemeanor unless the defendant possessed the ballot or carrier envelope without the request of the voter, in which case it is a felony of the third degree. If conduct that constitutes an offense

under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

(g-1) An offense under Subsection (g) is increased to the next higher category of offense if it is shown on the trial of an offense under this section that:

(1) the defendant was previously convicted of an offense under this code;

(2) the offense involved an individual 65 years of age or older; or

(3) the defendant committed another offense under this section in the same election.

(h) A ballot returned in violation of this section may not be counted. If the early voting clerk determines that the ballot was returned in violation of this section, the clerk shall make a notation on the carrier envelope and treat it as a ballot not timely returned in accordance with [Section 86.011\(c\)](#). If the ballot is returned before the end of the period for early voting by personal appearance, the early voting clerk shall promptly mail or otherwise deliver to the voter a written notice informing the voter that:

(1) the voter's ballot will not be counted because of a violation of this code; and

(2) the voter may vote if otherwise eligible at an early voting polling place or the election day precinct polling place on presentation of the notice.

(i) In the prosecution of an offense under Subsection (f):

(1) the prosecuting attorney is not required to negate the applicability of the provisions of Subsections (f)(1)-(6) in the accusation charging commission of an offense;

(2) the issue of the applicability of a provision of Subsection (f)(1), (2), (3), (4), (5), or (6) is not submitted to the jury unless evidence of that provision is admitted; and

(3) if the issue of the applicability of a provision of Subsection (f)(1), (2), (3), (4), (5), or (6) is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by [Acts 1987, 70th Leg., ch. 431, § 1, eff. Sept. 1, 1987](#); [Acts 1987, 70th Leg., ch. 472, § 28, eff. Sept. 1, 1987](#); [Acts 1991, 72nd Leg., ch. 203, § 1.18](#); [Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991](#); [Acts 1997, 75th Leg., ch. 1381, § 15, eff. Sept. 1, 1997](#); [Acts 2003, 78th Leg., ch. 393, § 14, eff. Sept. 1, 2003](#); [Acts 2007, 80th Leg., ch. 238, § 1, eff. Sept. 1, 2007](#); [Acts 2011, 82nd Leg., ch. 1159 \(H.B. 2449\), § 1, eff. Sept. 1, 2011](#); [Acts 2015, 84th Leg., ch. 1050 \(H.B. 1927\), § 7, eff. Sept. 1, 2015](#); [Acts 2017, 85th Leg., 1st C.S., ch. 1 \(S.B. 5\), § 12, eff. Dec. 1, 2017](#).

Notes of Decisions (12)

Footnotes

1 [V.T.C.A., Government Code § 573.021 et seq.](#)

V. T. C. A., Election Code § 86.006, TX ELECTION § 86.006

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Tab I

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated

Election Code (Refs & Annos)

Title 7. Early Voting (Refs & Annos)

Subtitle A. Early Voting

Chapter 86. Conduct of Voting by Mail (Refs & Annos)

V.T.C.A., Election Code § 86.010

§ 86.010. Unlawfully Assisting Voter Voting Ballot by Mail

Effective: December 1, 2017

Currentness

(a) A voter casting a ballot by mail who would be eligible under [Section 64.031](#) to receive assistance at a polling place may select a person as provided by [Section 64.032\(c\)](#) to assist the voter in preparing the ballot.

(b) Assistance rendered under this section is limited to that authorized by this code at a polling place, except that a voter with a disability who is physically unable to deposit the ballot and carrier envelope in the mail may also select a person as provided by [Section 64.032\(c\)](#) to assist the voter by depositing a sealed carrier envelope in the mail.

(c) The person assisting the voter must sign a written oath prescribed by [Section 64.034](#) that is part of the certificate on the official carrier envelope.

(d) If a voter is assisted in violation of this section, the voter's ballot may not be counted.

(e) A person who assists a voter to prepare a ballot to be voted by mail shall enter the person's signature, printed name, and residence address on the official carrier envelope of the voter.

(f) A person who assists a voter commits an offense if the person knowingly fails to comply with Subsections (c) and (e).

(g) An offense under this section is a state jail felony.

(h) Subsection (f) does not apply if the person is related to the voter within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code,¹ or was physically living in the same dwelling as the voter at the time of the event.

(i) An offense under this section is increased to the next higher category of offense if it is shown on the trial of an offense under this section that:

TAB I

- (1) the defendant was previously convicted of an offense under this code;
- (2) the offense involved a voter 65 years of age or older; or
- (3) the defendant committed another offense under this section in the same election.

(j) If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by [Acts 1991, 72nd Leg., ch. 203, § 2.12](#); [Acts 1991, 72nd Leg., ch. 554, § 1](#), eff. Sept. 1, 1991; [Acts 1997, 75th Leg., ch. 1381, § 16](#), eff. Sept. 1, 1997; [Acts 2003, 78th Leg., ch. 393, § 15](#), eff. Sept. 1, 2003; [Acts 2017, 85th Leg., 1st C.S., ch. 1 \(S.B. 5\), § 13](#), eff. Dec. 1, 2017.

Notes of Decisions (12)

Footnotes

1 [V.T.C.A., Government Code § 573.021 et seq.](#)

V. T. C. A., Election Code § 86.010, TX ELECTION § 86.010

Current through Chapters effective immediately through Chapter 5 of the 2019 Regular Session of the 86th Legislature

Tab J

FILED
AT 1:53 O'CLOCK P.M.
NOV - 9 2018

CAUSE NO. C-2637-18-B

NORBERTO "BETO" SALINAS,
COURT OF

Contestant,

VS.
TEXAS

ARMANDO O'CAÑA,

Contestee.

§

§

§

§

§

§

IN THE DISTRICT COURT
SAURA HINOJOSA, CLERK
District Court, Hidalgo County

By J Deputy #34

HIDALGO COUNTY,

93rd JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From September 24, 2018 to October 5, 2018, the Court held a trial in the above-referenced cause. The Court hereby issues the following findings of fact and conclusions of law. Any finding of fact more appropriately deemed a conclusion of law should be treated as such, and vice versa. All findings and conclusions are based on the proper, applicable evidentiary standard.

FINDINGS OF FACT

A. General Facts About the 2018 Mission Mayoral Election

1. The City of Mission held the general election for the office of Mayor on May 5, 2018. There were three candidates: the incumbent Mayor Norberto "Beto" Salinas, Dr. Armando O'Caña, and Jaime Gutierrez.

2. The results of the May general election for the office of Mayor were as follows:

Candidate	Vote	Percentage
Jaime Gutierrez	519	8.40 %
Armando O'Caña	2571	41.64%
Norberto "Beto" Salinas	3085	49.96%

3. The incumbent Mayor, Norberto "Beto" Salinas, came within three actual votes of winning the election without a run-off election.

4. A run-off election was held on June 9, 2018 between Dr. Armando O'Caña and Norberto "Beto" Salinas.

5. The results of the run-off election were as follows:

Candidate	Vote	Percentage
Armando O'Caña	3475	51.16%
Norberto "Beto" Salinas	3318	48.84%

6. The run-off election was canvassed on June 18, 2018, and it was undisputed at trial that Dr. Armando O'Caña won the run-off election by 157 votes.

B. Jurisdictional Findings and Procedural History

7. Norberto "Beto" Salinas is a resident of Hidalgo County, Texas and is the Contestant in this case.

8. Contestant filed suit on July 18, 2018, within the statutory 30-day contest period. TEX. ELEC. CODE § 232.008(b).

9. Dr. Armando O'Caña is a resident of Hidalgo County, Texas and is the Contestee in this case.

10. Trial commenced on September 24, 2018. There were eight days of trial testimony and one final day of argument. For the first eight days of trial, the Contestant put on thirty-four witnesses, including his chosen expert, George Korbel. Contestant rested on October 4, 2018.

11. On October 5, 2018, the Contestee chose not to put on any testimony and rested.

12. Both parties closed and presented closing arguments.

13. After closing arguments, the Court announced its judgment that the June 9, 2018, run-off election was void, as more than 158 illegal votes were counted. It also announced that the true outcome of that election could not be ascertained.

14. On October 8, 2018, the Contestee filed his notice of appeal, request for the clerk's record, and the request for the reporter's record.

C. The Anomaly of the June 9, 2018 Run-Off Election

15. The June 9, 2018 run-off election had a higher turnout than its antecedent general election. There were 6,175 total votes cast in the May 5, 2018 general election. There were 6,793 total votes cast in the run-off election—a difference of 618. In fact, the 2018 Mission run-off election had the largest turnout in the City since, at least, 2004.

16. In no other Mission run-off election had turn-out increased after the general election. For example, in the 2014 run-off election, the turnout in the run-off election totaled several hundred votes *fewer* than the general election.

17. The 2018 Mission run-off election also had the largest number of mail-in ballots in the history of Mission, Texas. There were 665 mail-in ballots in the run-off election—136 more than in the general election.

18. Dr. Armando O'Caña increased his votes in every phase of the run-off campaign: the absentee/mail-in ballots, the early vote, and votes cast on Election Day.

19. Dr. O'Caña's increase in mail-in ballot votes for the run-off campaign is most notable and unusual, given the short time between the general and run-off elections.

In the May general election, Dr. O’Caña received 269 mail-in ballot votes. In the run-off election, however, Dr. O’Caña received 393 mail-in ballot votes.

20. In contrast, Norberto “Beto” Salinas received 234 mail-in ballots during the general election and 272 mail-in ballots during the run-off election. The 121-vote difference in mail-in votes for O’Caña constituted most of his 157 vote margin in the run-off election.

21. Dr. Armando O’Caña also improved his electoral performance in the early vote. In the May general election, Norberto “Beto” Salinas won the early vote by nearly 500 votes. In the run-off election, Dr. O’Caña vastly improved his performance in the early vote, pulling within eight votes of Norberto “Beto” Salinas.

22. The 2018 Mission run-off election was the biggest election in the recent history of Mission. It had the highest turnout and the most mail-in ballots in the recent history of Mission, Texas. Yet, there were only thirty-four days between the general election and run-off election. In those thirty-four days, the O’Caña campaign reversed the outcome of the general election and was victorious.

D. Expert Testimony. George Korbel.

23. George Korbel testified as an expert witness. Mr. Korbel has worked in election analysis for forty-eight years, largely in the voting-rights area. He has participated as an attorney or expert witness in nearly every major voting-rights case in Texas since 1973. During that time, the U.S. Supreme Court, the Fifth Circuit, and various U.S. District Courts have relied on his expert testimony. Mr. Korbel has also testified before the Texas legislature, the U.S. Congress, and the Department of Justice in defense of voting rights.

24. Mr. Korbel has published monographs on election laws used by the U.S. Commission on Civil Rights. Most recently, Mr. Korbel has been certified as an expert in seven cases in the last four years related to election systems and voting rights. He was an expert in the Voter I.D. case, the Texas redistricting case, and in several at-large challenges in the past decade. Mr. Korbel has taught classes on election analysis and voting laws. And, he has testified as a witness and participated in several election challenges in the past forty years. Mr. Korbel also has considerable experience working with elderly and disabled voters and clients by virtue of his work at Texas Rio Grande Legal Aid.

25. Based on Mr. Korbel's curriculum vitae, and his testimony, the Court finds Mr. Korbel was qualified by his knowledge, training, and experience to render the opinions he presented in this case, and the Court found his opinions helpful, relevant, and reliable.

26. Mr. Korbel surveyed election history in Hidalgo County. He determined that the turnout in run-off elections exceeded the turnout in the immediately preceding general elections in only two other municipal elections in Hidalgo County since 2011. Those two elections were the City of Mercedes's election in 2011 and the City of Hidalgo's election in 2016. Mr. Korbel testified that there had been recent arrests for voter fraud in the City of Hidalgo election, which may explain the increased turnout.

27. Mr. Korbel also testified that it was extraordinary for an incumbent who secured 49.96% of the vote in the general election to later lose a run-off election. In his 48 years as an election analyst, Mr. Korbel could not recall an election in which an

incumbent had come so close to winning without a run-off, but had gone on to lose the run-off election.

28. Mr. Korbel testified that several factors might explain an increased turnout in a run-off election: natural disaster, scandal, a popular or unpopular bond issue, referenda, or other election-event held on the same day as the election. But, there were no such election-events that would explain the increased turnout in the June 9, 2018 run-off election. And, both campaigns had sufficient campaign funds, so a disparity in funding could not explain the increased turnout.

E. O'Caña Campaign Bribing Voters.

29. The O'Caña campaign engaged in an orchestrated conspiracy to pursue illegal votes through bribing voters and harvesting mail-in ballots. The vote buying and other illegal activities on behalf of the O'Caña campaign were **not** the actions of overly enthusiastic campaign workers acting individually, but was a concerted effort by the leaders of the campaign to win regardless of legality.

29. In March 2018 Dr. O'Caña hired VO Consulting Services to handle his logistics and operations for his mayoral campaign. VO Consulting Services was a newly-fashioned political operative firm run by Dr. O'Caña's niece, Veronica O'Caña, which she formed on March 14, 2018. VO Consulting Services was in charge of public and digital outreach for the O'Caña campaign.

30. Dr. O'Caña raised in excess of \$38,000 for his mayoral race. He estimated that he spent 80% of that money on VO Consulting Services. Yet, Dr. O'Caña admitted that he had no receipts, expenditure reports, or any other record or document that would evidence the work that VO Consulting Services performed for his campaign.

31. Dr. O'Caña also admitted he deleted his records before, during, and after this lawsuit was filed, including his communications with VO Consulting Services. He testified he had no receipts or other records showing what VO Consulting Services spent money on for his campaign. The owner of VO Consulting, Veronica O'Cana, could not be subpoenaed to testify at trial or via deposition, although 12 or more attempts were made.

32. Veronica O'Cana rented a luxurious white Mercedes Benz van to use during the campaign for \$500 cash. It was used to solicit prospective voters to be bribed to vote for O'Cana. Six voters testified they were solicited by O'Cana workers to vote for their candidate for \$20 each, with an added bonus if they could bring more voters in to be bribed. They all testified they were picked up by a white Mercedes van and taken to the voting place, where a worker came on board and got permission to assist them in their voting. After they had voted with assistance, they were paid \$20 each and taken home. One bribed voter testified that while in the van, he heard a campaign worker asking others on his cell phone to vote for a \$20 bribe.

33. The direct testimony of fact witnesses was that the O'Cana campaign bribed at least 18 voters.

34. George Korbel, the contestant's expert viewed the list of assisted voters finding the names of the bribed voters who testified to such. He found at least 48 voters who had most likely been bribed, comparing the closeness of times of voting and the names of those giving assistance to those who had testified as being bribed that day.

35. Mr. Korbel, as part of his election analysis, reviewed the testimony, the affidavits, the election materials, and his interviews to formulate his opinion on the vote

bribery at issue in this cause. He was present during the entirety of the trial hearing all testimony.

36. The Court finds Mr. Korbel's expert opinions to be relevant, reliable, and based on sufficient facts and data. The methodology Mr. Korbel used to form his opinions, including reviewing historical election data, conducting interviews, and statistical analysis, is testable and backed by sound methods used by election analysts in judicial and non-judicial inquiries. The Court finds that at least 48 voters were bribed to vote for Dr. Armando O'Caña during the June run-off election, but many more voters were likely bribed.

F. Mail in Ballot Illegality.

37. Mail in ballots are designed for only the voter to handle to the ballot after it has been completed except under limited circumstances. One may not possess another's completed ballot or carrier envelope unless the name of the possessor is printed on the envelope and signed with his address. Similarly, if the voter is assisted in completing the ballot, the assister's oath must be taken and a section must be completed on the envelope. If one is assisting the voter in depositing the envelope in the mail, the appropriate section must be completed.

38. Many voters testified they received a mail in ballot although they had not requested one, and some testified that the signature on the request was not theirs although it was their name and address. Workers of the O'Cana campaign would call voters asking if they had yet received their ballot, and, if not, to call them when they do, and they would come by and pick it up. Indeed, this happened on many occasions.

39. The O'Caña campaign systematically violated the Texas Election Code by taking mail-in ballots from voters and depositing them in the mail, without signing the form on the back side of the carrier envelope to indicate assistance was rendered, making the ballots and votes illegal.

40. After receiving the call from a voter that the ballot had arrived, an O'Cana campaign worker would go to their house, often assist the voter in completing the ballot, and take the completed ballot. No indication of this assistance would generally appear on the ballot or carrier envelope.

41. On two occasions witnesses testified of seeing two particular O'Cana workers with many mail in ballots each. One witness testifying to a stack of ballots six inches high and another a "large bag full."

Korbel's Expert Testimony Related to Mail-In Ballots

42. George Korbel testified that he reviewed all of the carrier envelopes submitted in the June 9, 2018 run-off election. He also reviewed the carrier envelopes for the May general election.

43. Mr. Korbel examined the kinds of stamps used on the envelopes. Out of the 689 mail-in ballots cast in the June 9, 2018 run-off election, 357 carrier envelopes were stamped with a 2018 Forever stamp that has a folded American Flag on its face.

44. Mr. Korbel testified that these stamps come in rolls or coils, which contain 100 stamps and retail for \$50.00. He testified that these stamps are also sold in books of twenty stamps for \$10.00.

45. If a stamp is sold in a book, it will have perforations on the top or bottom of the stamp and on either of the sides of the stamp. If a stamp is used from a roll or coil, the stamp will only have side perforations.

46. In the June 9, 2018 run-off election, 322 mail-in ballots were stamped with a 2018 Forever stamp with a folded American flag on its face, which came from a roll or coil as evidenced by the side perforations.

47. Only 19 of these ballots had been marked as being voted with assistance, while 303 of these ballots had no markings for assistance, but yet had used an identical stamp that was purchased from a roll or coil.

48. Mr. Korbel testified that he had a great deal of experience of working with seniors and the disabled through his work at Texas Rio Grande Legal Aid. He testified that most seniors and disabled people live on fixed incomes of less than \$800 per month. He did not believe that it was likely that seniors would have purchased a \$50 roll of stamps.

49. In preparation for his expert testimony, Mr. Korbel had reviewed all of the affidavits of voters who had their mail-in ballots harvested. He interviewed several affected voters. He also reviewed the election materials. In addition, Mr. Korbel reviewed the testimony that was presented at trial. In every case in which a ballot was harvested, the ballot in question was stamped with 2018 Forever stamp that had side perforations, meaning they had come from an expensive coil or roll of stamps.

50. Mr. Korbel testified that it was likely that there was an orchestrated effort to increase the amount of mail-in ballots in the June 9, 2018 run-off election. The basis of

his belief was that the number of mail-in ballots had increased dramatically from the general election to the run-off election.

51. Also, the amount of carrier envelopes using postage with a stamp from a roll had dramatically increased. In the general election in May, there were only 120 envelopes using the 2018 Forever stamp, 79 (or 65%) of which came from a roll. In the run-off election, 322 stamps came from a roll in an election that was only thirty-four days after the previous election.

52. In addition, all of the voters who had had their mail-in ballots harvested had shared commonalities. Most were harvested by a woman named Elizabeth Hernandez. All of them used the same stamp, and all the stamps came from a roll. Each of the voters told a similar story that, given the commonalities, was unlikely to be false.

53. Mr. Korbel testified that state law prevented the counting of mail-in ballots that were in the possession of another person. The policy rationale of this law was to ensure the chain-of-custody of the ballot. Mr. Korbel stated that the chain-of-custody of a ballot that was illegally in the possession of another person could not be relied upon as having been voted in the way that the voter had preferred.

54. Mr. Korbel testified that based on his review of the testimony, the affidavits, election materials, and the testimony at trial, at least 27 voters had their votes harvested by members of the O'Caña campaign. Mr. Korbel testified that the range of harvested voters was likely 27–303 voters.

55. I find clear and convincing evidence that the number of illegally handled mail in ballots by members of the O'Cana campaign is in excess of 150 although it is impossible to know the exact number.

D. The True Outcome of the Election is Unknown

56. The final canvass reflected a margin of 157 votes between the victor, Dr. Armando O’Caña, and the incumbent Mayor, Norberto “Beto” Salinas.

57. The Court finds the O’Caña campaign illegally bribed voters, took mail in ballots, and assisted voters in voting in excess of 158 votes.

CONCLUSIONS OF LAW

58. All the votes attributable to Armando O’Cana that were obtained illegally through bribery, mis-handling of mail in ballots or unattributable voter assistance are illegal votes and cannot be counted.

59. The Court finds by clear and convincing evidence that at least 48 illegal votes were cast in the election as a result of bribery and improper assistance by the O’Caña campaign.

60. The Court finds by clear and convincing evidence that the O’Caña campaign harvested 200 votes through its illegal possession and mailing of ballots.

61. The precise number of illegal votes cast for Armando O’Cana for mayor in the run off election of June 9, 2018, cannot be ascertained but it is in excess of 158 votes.

62. In addition to the facts found, the court engages in an adverse inference against the contestee, Dr. Armando O’Cana, because of his destruction of presumptively adverse evidence in his control, akin to spoliation. He has a duty to preserve evidence when he knows, or reasonably should know, that there is a substantial chance that a claim will be filed, and (b) that evidence in its possession or control will be potentially relevant to that claim. The Court finds Dr. O’Caña and/or his agents intentionally destroyed the

correspondence between Dr. O'Caña and his campaign workers in order to conceal relevant evidence. The Court presumes this destroyed evidence supports a finding that at least 158 votes were illegally cast.

63. The true outcome of the run off election of June 9, 2018, cannot be determined because of the illegal votes cast.

November 9, 2018

DATE


JUDGE PRESIDING

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Tab K

1 REPORTER'S RECORD
2 VOLUME 3 OF 12 VOLUMES
3 TRIAL CAUSE NO. C-2637-18-B FILED IN
APPELLATE COURT CAUSE NO. 13-18-00060-COURT OF APPEALS
CORPUS CHRISTI/EDINBURG, TEXAS

11/2/2018 11:27:13 AM

DORIANE RAMIREZ
Clerk

4 NORBERTO 'BETO' SALINAS)
5)
6 vs.) 93rd JUDICIAL DISTRICT
7 ARMANDO O'CANA) HIDALGO COUNTY, TEXAS

11 _____
12 TRIAL PROCEEDINGS

13 (Continued)
14 _____
15
16
17
18 On the 25th day of September, 2018, the
19 following proceedings came on to be heard in the above-entitled
20 and numbered cause before the HONORABLE BONNER DORSEY, Judge
21 Presiding, held in Edinburg, Hidalgo County, Texas:
22 Proceedings reported by Stenograph Machine.
23
24
25 TAB K

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25 ATTORNEYS FOR DEFENDANT

1 MR. HINOJOSA: Yeah.

2 Q. (BY MR. HINOJOSA) Did you write that?

3 A. Yes.

4 Q. Okay.

5 A. With the dictionary and everything in the library.

6 When I am interested in something I go there.

7 Q. And then did you also write "I then saw the office
8 lady give a --"

9 A. I cannot write.

10 Q. "-- something of mail-in ballots." Did you -- "I
11 then saw the office lady give a number," or something like
12 that, "of mail-in ballots to the short, chubby lady." Did you
13 write that?

14 THE WITNESS: Si.

15 Q. (BY MR. HINOJOSA) Okay, right?

16 A. Yes, in the dictionary.

17 Q. "It looked like since she did not live there and that
18 there were why -- way too many ballots." Did you say that?
19 Did you write that?

20 A. Yes, a lot of ballots, yes.

21 Q. "After -- after I looked at the pictures, I picked
22 out Esmer Lara. I picked out Esmer Lara out." Did you write
23 that?

24 A. I wrote all of that, yes.

25 Q. "If I was to estimate how many ballots were taken I'd

1 say 20 to 40." Did you write that?

2 A. Yes.

3 Q. So, when you testified earlier that you saw -- the
4 only thing you saw was Ms. Lara walking out of the office with
5 a bunch of ballots in her hand, that was not what you
6 originally swore to, right?

7 A. Well, I say what I spoke. I said it.

8 Q. And when you -- and when you testified that there was
9 200 ballots in the possession of Ms. Lara, that's not what you
10 swore to before, right?

11 A. Well, what I say is like this, I only kind of guess.

12 Q. Well, you, on your own volunteered, did you not, that
13 there were 200 ballots, right?

14 A. Well, I did --

15 MR. SALINAS: Your Honor --

16 A. -- it is --

17 MR. SALINAS: -- and for the record, she's using
18 her hands. Since we don't have a record of it, she's --

19 MR. HINOJOSA: Your Honor, that doesn't matter
20 what he wants. Is there an objection? Is there an objection?

21 THE COURT: Wait a minute.

22 MR. SALINAS: What I'm saying is that it's
23 nonverbal communication that's important for the record.

24 MR. HINOJOSA: Your Honor, it doesn't matter
25 what he says, it's not --